## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, Inc.,	)	
AMERICAN CIVIL LIBERTIES UNION	)	
FOUNDATION, Inc.,	j j	
125 Broad Street, 18th Floor	)	
New York, NY 10004	)	
,	)	
Plaintiffs,	)	
,	)	
v.	)	No.
	)	
DONALD TRUMP, in his official capacity	)	
as President of the United States,	)	
1600 Pennsylvania Avenue NW	)	
Washington, DC 20500,	)	
	)	
MICHAEL PENCE, in his official capacity	)	
as Vice President of the United States	)	
and chair of the Presidential Advisory	)	
Commission on Election Integrity,	)	
1 Observatory Circle NW	)	
Washington, DC 20008,	)	
	)	
PRESIDENTIAL ADVISORY	)	
COMMISSION ON ELECTION INTEGRITY,	)	
an advisory committee commissioned	)	
by President Donald Trump,	)	
Eisenhower Executive Office Building	)	
1650 Pennsylvania Avenue NW	)	
Washington, DC 20502	)	
5 A 1	)	
Defendants.	)	
	)	

#### **COMPLAINT FOR DECLARATORY AND MANDAMUS RELIEF**

Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (together, the "ACLU") bring this action against Donald Trump, in his official capacity as President of the United States ("President Trump"), Michael Pence, in his official capacity as Vice President of the United States and chair of the Presidential Advisory

Commission on Election Integrity ("Vice President Pence"), and the Presidential Advisory Commission on Election Integrity ("Pence-Kobach Commission") (collectively, "Defendants"), seeking relief in the nature of mandamus compelling Defendants to comply with the nondiscretionary requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 §§ 1-16, and a declaration that Defendants have violated FACA.

Defendants have violated FACA in two respects. *First*, Vice President Pence and the Pence-Kobach Commission have already violated, and absent relief, will continue to violate the non-discretionary transparency and public access requirements of § 10 of FACA, 5 U.S.C. app. 2 § 10. The Pence-Kobach Commission has already held its first meeting without public notice; without making that meeting open to the public; and without timely notice in the Federal Register, *id.* § 10(a). It has also failed to make any of its "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Pence-Kobach Commission "available for public inspection," *id.* § 10(b). The second meeting of the Pence-Kobach Commission is now scheduled to take place in a building generally inaccessible to the public, and none of the documents already relied upon by the Commission have been made available to the public.

Second, President Trump has violated requirements under § 5 of FACA, 5 U.S.C. app. 2 § 5, that an advisory committee's membership be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee," *id.* § 5(b)(2); and that "appropriate provisions" be made "to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment[,]" *id.* § 5(b)(3). The Pence-Kobach Commission's stated purpose is to "study the

registration and voting processes used in Federal elections" and "submit a report to the President" on related "laws, rules, policies, activities, strategies, and practices." Exec. Order No. 13,799, § 3, 82 Fed. Reg. 22389 (May 11, 2017). But, in fact, the Commission was established for the purpose of providing a veneer of legitimacy to President Trump's false claim that he won the popular vote in the 2016 election—once millions of supposedly illegal votes are subtracted from the count. That purpose is evident in the composition of the Commission, which is stacked with individuals who have endorsed the President's false statements about the popular vote, and the fact that no provisions whatsoever have been made to insulate the Commission's advice and recommendations from inappropriate influence by the person who appointed the Commission's members—*i.e.*, President Trump himself.

#### THE PARTIES

- 1. Plaintiff American Civil Liberties Union is a 501(c)(4) non-profit, nationwide, non-partisan membership organization with approximately 1.6 million members, many of whom are registered voters. The ACLU is dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws, including laws protecting access to the right to vote.
- 2. Plaintiff American Civil Liberties Union Foundation is a 501(c)(3) non-profit, nationwide, non-partisan organization with nearly 300 staff attorneys, thousands of volunteer attorneys, and offices throughout the nation. Since 1965, the ACLU, through its Voting Rights Project, has litigated hundreds of voting rights cases and has a direct interest in ensuring that all eligible citizens are able to access the franchise and are not removed from voter rolls, and in empowering those targeted by vote suppression. The ACLU regularly litigates cases in which government officials attempt to limit access to the franchise and keep eligible voters off the

registration rolls, and therefore has a direct interest in the purported purpose of the Presidential Advisory Commission on Election Integrity ("Pence-Kobach Commission").

- 3. Defendant Donald Trump is the President of the United States. He is sued in his official capacity. In that capacity, he issued Executive Order 13,799 of May 11, 2017, establishing the Pence-Kobach Commission, and appoints the members of the Commission.
- 4. Defendant Michael Pence is the Vice President of the United States. He is sued in his official capacity. In that capacity, Vice President Pence is the chair of the Pence-Kobach Commission.
- 5. Defendant Presidential Advisory Commission on Election Integrity ("Pence-Kobach Commission") was established by President Trump pursuant to Executive Order 13,799, and is a presidential advisory committee. Exec. Order No. 13,799.

#### **JURISDICTION AND VENUE**

- 6. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361. Plaintiffs also seek relief pursuant to 28 U.S.C. §§ 2201 and 2202.
  - 7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e).

#### **FACTS**

#### I. Statutory and Regulatory Framework

8. The Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 §§ 1-16, was enacted because of the congressional concern with the number and utility of advisory committees. Congress found, among other things, that committees "should be established only when they are determined to be essential" and that "Congress and the public" should be kept abreast of their activities. 5 U.S.C. app. 2 § 2(b). "FACA's principal purpose was to establish procedures aimed at enhancing public accountability of federal advisory committees." *Ctr. for* 

Law & Educ. v. U.S. Dep't of Educ., 209 F. Supp. 2d 102, 113 (D.D.C. 2002), aff'd 396 F.3d 1152 (D.C. Cir. 2005); see also Food Chem. News, Inc. v. Davis, 378 F. Supp. 1048, 1051 (D.D.C. 1974) (purpose of FACA "to control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals").

- 9. FACA applies to "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . established or utilized by the President . . . in the interest of obtaining advice or recommendations for the President," denominating such groups as "advisory committees." 5 U.S.C. app. 2 § 3(2).
- 10. Only those committees that are "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government" or "created by the National Academy of Sciences or the National Academy of Public Administration" fall outside the definition of "advisory committee" under the Act. 5 U.S.C. app. 2 § 3(2). And all of the provisions of FACA apply to advisory committees except when an "Act of Congress establishing any such advisory committee specifically provides otherwise." 5 U.S.C. app. 2 § 4(a).
- 11. FACA requires that in establishing an advisory committee, the President "shall" follow the guidelines of the statute, 5 U.S.C. app. 2 § 5(c), including that the directive establishing the advisory committee must, among other things, "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee" and "contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment." 5 U.S.C. app. 2 § 5(b)(2)-(3).

- 12. FACA demands transparency in the procedures and meetings of advisory committees. All advisory committee meetings must be open to the public and must be timely noticed in the Federal Register. 5 U.S.C. app. 2 § 10(a)(1)-(2). Interested members of the public must "be permitted to attend, appear before, or file statements with any advisory committee," subject only to "reasonable" regulations set by the Administrator of General Services. *Id.* § 10(a)(3). Although portions of meetings may be closed where the President determines that closure is provided for pursuant to 5 U.S.C. § 552b(c) (the federal Open Meetings statute), any such determination must be made in writing and set forth the reasons for the conclusion. 5 U.S.C. app. 2 § 10(d).
- 13. Advisory committee meetings must be noticed in the Federal Register at least fifteen days before the meeting is to be held. 41 C.F.R. § 102-3.150(a).
- 14. Each advisory committee meeting must be "held at a reasonable time and in a manner or place reasonably accessible to the public," and in a place sufficient to accommodate "a reasonable number of interested members of the public." 41 C.F.R. § 102-3.140(a)-(b).
- 15. If an advisory committee meeting is held via teleconference, videoconference, or other electronic medium, it still must be made accessible to the public. 41 C.F.R. § 102-3.140(e).
- 16. Subject to the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports." 5 U.S.C. app. 2 § 10(b).

- 17. FACA mandates that "[d]etailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee." 5 U.S.C. app. 2 § 10(c).
- 18. Advisory committees must make available copies of transcripts of advisory committee meetings to "any person" at only the "actual cost of duplication." 5 U.S.C. app. 2 § 11(a).
- 19. Each of the requirements of FACA is mandatory on the appointing authority, in this case, President Trump, and on the advisory committee itself.

#### II. The Creation of the Pence-Kobach Commission

#### A. Events Leading to the Creation of the Pence-Kobach Commission

- 20. Following the 2016 Presidential Election, the official results of the popular vote indicated that 65,853,516 votes were cast for Democratic nominee, Hillary Rodham Clinton, and 62,984,825 votes were cast for Republican nominee, Donald Trump, and the official results of the Electoral College indicated that 227 Electoral College votes were cast for Democratic nominee Hillary Rodham Clinton, and 304 Electoral College votes were cast for Republican nominee Donald Trump. Federal Election Commission ("FEC"), Official 2016 Presidential General Election Results (Jan. 30, 2017), *available at* https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf.
- 21. On November 20, 2016, President Elect Trump met with Kansas Secretary of State Kris Kobach, now vice-chair of the Pence-Kobach Commission. Outside that meeting, Secretary Kobach was photographed by the Associated Press with a document that appeared to

reference proposed amendments to the National Voter Registration Act, 52 U.S.C. §§ 20501-511. *See, e.g.*, Peter Hancock, *Kobach Ordered To Turn Over Document He Used in Meeting with Trump*, Lawrence J.-World (Apr. 5, 2017), http://www2.ljworld.com/news/2017/apr/05/kobach-ordered-turn-over-document-he-used-meeting-/; *see also* Order, *Fish v. Kobach*, No. 16-cv-2105-JAR-JPO (D. Kan. Apr. 17, 2017) (ECF No. 320); Order, *Fish v. Kobach*, No. 16-cv-2105-JAR-JPO (D. Kan. June 23, 2017) (ECF No. 355).

- 22. On November 27, 2016, President Elect Trump tweeted, "In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally." *See* Donald Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 12:30 PM), https://twitter.com/realDonaldTrump/status/802972944532209664.
- 23. On November 30, 2016, Secretary Kobach, now vice-chair of the Pence-Kobach Commission stated, "I think the president-elect is absolutely correct when he says the number of illegal votes cast exceeds the popular vote margin between him and Hillary Clinton at this point." Hunter Woodall, *Kris Kobach Agrees with Donald Trump that 'Millions' Voted Illegally But Offers No Evidence*, Kan. City Star (Nov. 30, 2016), http://www.kansascity.com/news/politics-government/article117957143.html [hereinafter Woodall, *Kris Kobach Agrees with Donald Trump*].
- 24. President Trump has continued to assert, contrary to all available factual evidence and the findings of the FEC, that he won the popular vote. *See, e.g.*, Charles Ventura, *Trump Revives False Claim That Illegal Ballots Cost Him Popular Vote*, USA Today (Jan. 23, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/01/23/president-trump-illegal-ballots-popular-vote-hillary-clinton/96976246/; Aaron Blake, *Donald Trump Claims None of Those 3 to 5 Million Illegal Votes Were Cast for Him. Zero.*, Wash. Post (Jan. 26, 2017),

https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/donald-trump-claims-none-of-those-3-to-5-million-illegal-votes-were-cast-for-him-zero/?tid=a\_inl&utm\_term=.1e862115ce52.

- 25. Indeed, President Trump's own legal team argued that "[a]ll available evidence suggests that the 2016 general election was *not* tainted by fraud or mistake." Donald J. Trump and Donald J. Trump for President, Inc.'s Objs. to Dr. Jill Stein's Recount Pet. at 2, In re Pet. for Recount for the Office of President of the United States of America (Mich. Bd. of State Canvassers Dec. 1, 2016), *available at* https://www.michigan.gov/documents/sos/Objection\_to\_Recount\_Petition\_544089\_7.pdf.
- 26. Vice President Pence attended and participated in the meeting with congressional leaders at which President Trump asserted he won the popular vote but for illegal voters. *See The Latest: Trump Repeats Unproven Claim of Illegal Votes*, Associated Press (Jan. 24, 2017), https://www.apnews.com/2987214f67da4b2d8900bc995e864912.
- 27. On February 9, 2017, at a meeting with ten Senators on the Supreme Court nomination, President Trump asserted that he and former-Senator Kelly Ayotte would both have won New Hampshire but for "thousands' of people who were 'brought in on buses' from neighboring Massachusetts to 'illegally' vote in New Hampshire." Eli Stokols, *Trump Brings up Vote Fraud Again, This Time in Meeting with Senators*, Politico (Feb. 10, 2017), http://www.politico.com/story/2017/02/trump-voter-fraud-senators-meeting-234909. No factual evidence supports that assertion.

#### B. Composition of the Pence-Kobach Commission

28. On May 11, 2017, President Trump issued Executive Order 13,799, establishing the Pence-Kobach Commission. The Executive Order provides that the Commission would be chaired by the Vice President, be composed of not more than fifteen additional members selected

by the President, and that the Vice President may select a vice chair from among the other members. Exec. Order No. 13,799, § 2.

- 29. The purported "[m]ission" of the Pence-Kobach Commission is to "study the registration and voting processes used in Federal elections." Exec. Order No. 13,799, § 3. The Commission is to "submit a report to the President that identifies . . . those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections; . . . those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections; and . . . those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting." *Id*.
- 30. The Executive Order does not contain any provisions that "assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority," 5 U.S.C. app. 2 § 5(b)(3), in this case, President Trump. *See* Exec. Order No. 13,799.
- 31. Also on May 11, 2017, President Trump named Secretary Kobach as Vice Chair of the Commission. Press Release, Office of the Press Secretary, President Announces Formation of Bipartisan Presidential Commission on Election Integrity (May 11, 2017), available at https://www.whitehouse.gov/the-press-office/2017/05/11/president-announces-formation-bipartisan-presidential-commission [hereinafter "Executive Order Release"].
- 32. Upon the issuance of the Executive Order, President Trump also named five additional members of the Pence-Kobach Commission: Connie Lawson, Secretary of State of Indiana; Bill Gardner, Secretary of State of New Hampshire; Matthew Dunlap, Secretary of State

of Maine; Ken Blackwell, Former Secretary of State of Ohio; and Christy McCormick, Commissioner, Election Assistance Commission. *See* Executive Order Release.

- 33. At least four out of these six initial appointees to the Commission have a record of making exaggerated and/or baseless claims about voter fraud, and/or have implemented or supported policies that have unlawfully disenfranchised voters.
- 34. Secretary Kobach has repeatedly made exaggerated claims about non-citizen voting. The United States Court of Appeals for the Tenth Circuit, in a decision finding that Secretary Kobach has engaged in the "mass denial of a fundamental constitutional right," because he disenfranchised 18,000 motor-voter applicants in Kansas, found that Secretary Kobach's assertions about widespread non-citizen voting were "pure speculation." *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016). In the same case, Secretary Kobach was recently sanctioned by the magistrate judge for "deceptive conduct and lack of candor," and for making "patently misleading representations to the court" about the document that he carried into his November 20, 2016 meeting with President-elect Trump. *Fish v. Kobach*, No. 16-cv-2105-JAR, 2017 WL 2719427, at \*2-\*3, \*5 (D. Kan. June 23, 2017).
- 35. When recently asked about his previous statements about Donald Trump winning the popular vote and the absence of evidence to support this claim, Secretary Kobach replied, "I guess it all depends on what you define as evidence." "Voting Commissioner Kris Kobach Defends U.S. Request For Voter Information," *All Things Considered*, Nat'l Pub. Radio (June 30, 2017), http://www.npr.org/2017/06/30/535059231/voting-commissioner-kris-kobach-defends-u-s-request-for-voter-information.
- 36. Like Secretary Kobach, Commission member Ken Blackwell has made unfounded assertions about noncitizens voting. In response to President Trump's claims that he

had won the popular vote but for illegal votes, Mr. Blackwell penned a commentary asserting that Secretary Clinton received over 800,000 illegal votes from non-citizens, and based this claim on the work of Old Dominion University professor Jesse Richman. Ken Blackwell, Election Integrity Can't Daily Caller (Feb. 7. 2017). Wait. The http://dailycaller.com/2017/02/07/electoral-integrity-cant-wait/. Professor Richman, however, disclaimed this use of his research, expressly stating that he has not done a study of the 2016 election. See Jesse Richman, "I Do Not Support the Washington Times Piece" (Jan. 27, 2017), https://fs.wp.odu.edu/jrichman/2017/01/27/i-do-not-support-the-washington-times-piece/. Professor Richman has also expressly written, "My study DOES NOT support Trump's claim that millions of non-citizens voted in the 2016 election." Jesse Richman, "Why I Would Sign the Were 'Open Letter' If It True" (March 10. 2017), https://fs.wp.odu.edu/jrichman/2017/03/10/why-i-would-sign-the-open-letter-if-it-were-true/.

37. Like Secretary Kobach, Mr. Blackwell has unlawfully disenfranchised voters. As Secretary of State of Ohio, Mr. Blackwell announced on September 7, 2004, less than a month before the voter registration deadline for the 2004 general election, that voter registration forms would be processed only if they were printed on eighty-pound unwaxed white paper stock, specifying that complete voter registration forms from eligible voters that were printed on less heavy-weight paper would not be processed. *See* Ohio Secretary of State Directive, No. 2004-31, Section II (Sept. 7, 2004). The directive was later reversed. Regarding that same election, the Sixth Circuit Court of Appeals determined that another Directive from Mr. Blackwell violated the Help America Vote Act, denying provisional ballots to individuals clearly entitled to cast them under the law. *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004).

- 38. Commission member Gardner has a similar record. Secretary Gardner has recently pushed for tightening access to the polls in New Hampshire, saying that the state has "drive-by voting." *See* Associated Press, N.H. Pub. Radio (Nov. 26, 2016), http://nhpr.org/post/republicans-looking-tighten-nh-election-laws#stream/0.
- 39. Like Secretary Kobach, Secretary Gardner has been found by a court to have unlawfully disenfranchised voters in his State. The New Hampshire Supreme Court found that Gardner promulgated a voter registration form that was "confusing and inaccurate," and "could cause an otherwise qualified voter not to register to vote in New Hampshire." *Guare v. New Hampshire*, 167 N.H. 658, 665, 117 A.3d 731, 738 (2015). The Court concluded that, "as a matter of law, the burden it imposes upon the fundamental right to vote is unreasonable." *Id*.
- 40. Commission member McCormick has a similar record of supporting policies and practices that have disenfranchised voters. In litigation involving Vice Chair Kobach's efforts to require documentary proof of citizenship from individuals registering to vote with the federal voter registration form, EAC Commissioner McCormick attempted to reject the Department of Justice as counsel for the EAC and retain her own personal counsel, in order to file memoranda and declarations in support of Secretary Kobach's position in the case. *See* Docket, *League of Women Voters v. Newby*, No. 16-cv-236-RJL (D.D.C.). The D.C. Circuit later ruled that the documentation requirements favored by Secretary Kobach and Commissioner McCormick created "a substantial risk that citizens will be disenfranchised in the present federal election cycle[,]" and will "make it substantially more difficult for groups like the League[ of Women Voters] to register otherwise qualified voters." *League of Women Voters v. Newby*, 838 F.3d 1, 12-13 (D.C. Cir. 2016).

- 41. On June 21, 2017, President Trump named three additional Commission members: Luis Borunda, David K. Dunn, and Mark Rhodes. Press Release, Office of the Press Secretary, President Donald J. Trump Announces Intent to Nominate Personnel to Key Administration Posts (June 21, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/06/21/president-donald-j-trump-announces-intent-nominate-personnel-key. Two of these appointees have no experience with election administration.
- 42. Mark Rhodes is the county clerk of Wood County, West Virginia, a county with 56,105 registered voters. *See* W.V. Secretary of State, Voter Registration Totals, http://www.sos.wv.gov/elections/VoterRegistration/Pages/Voter\_Registration.aspx (last visited July 6, 2017). Upon his appointment, Clerk Rhodes stated that he was not sure why he was appointed to the Pence-Kobach Commission, and that he thought that West Virginia's Republican Secretary of State recommended him because Vice President Pence and Vice Chair Kobach were looking for a Democratic county clerk, and "there's not a whole lot of those in West Virginia." Kira Lerner, *The White House's Voter Fraud Commission Is Starting To Take Shape*, Think Progress (June 22, 2017), https://thinkprogress.org/fraud-commission-rhodes-bf8cd04daec4.
- 43. David K. Dunn was previously a member of the Arkansas House of Representatives. He does not have any experience in administering elections. Capitol Partners, http://www.capitolpartners.co/partners/ (last visited July 6, 2017). Upon his appointment, Mr. Dunn stated, "I don't know why this has fallen on my shoulders . . . I'm just a very small old country boy from Arkansas in this bigger commission with Vice President Pence, and I'm just going to do the best I can, to be honest." Arkansas's Republican Secretary of State recommended him to the Commission. Sam Levine, *Some of Trump's New Election*

Investigators Don't Seem To Have Much Election Experience, Huffington Post (June 22, 2017), available at http://www.huffingtonpost.com/entry/trump-voter-fraud-commission\_us\_594c1068e 4b01cdedf01e75e?3pa.

- 44. Luis Borunda is the Deputy Secretary of State of Maryland, a position that has no elections-related responsibilities. On July 3, 2017, Deputy Secretary Borunda resigned from the Pence-Kobach Commission. *See* Luke Broadwater, *Maryland Official Resigns from Trump Voter Fraud Panel*, Balt. Sun (July 3, 2017), http://www.baltimoresun.com/news/maryland/politics/bs-md-borunda-resigns-trump-20170703-story,amp.html.
- 45. On June 29, 2017, President Trump named Hans A. von Spakovsky as a member of the Pence-Kobach Commission. Press Release, Office of the Press Secretary, President Donald J. Trump Announces Key Additions to his Administration (June 29, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/06/29/president-donald-j-trump-announces-key-additions-his-administration.
- 46. Mr. von Spakovsky has a long history of making baseless claims about voter fraud. *See, e.g.*, Jane Mayer, *The Voter-Fraud Myth*, The New Yorker (Oct. 29-Nov. 5, 2012), http://www.newyorker.com/magazine/2012/10/29/the-voter-fraud-myth; Richard L. Hasen, The Voting Wars 62-64, 129 (Yale Univ. Press 2012). In response to President Trump's baseless claims that he had won the popular vote but for illegal votes, Mr. von Spakovsky wrote, "there is a real chance that significant numbers of noncitizens and others are indeed voting illegally." Hans A. von Spakovsky & John Fund, *Do Illegal Votes Decide Elections?*, Wall St. J. (Nov. 30, 2016), https://www.wsj.com/articles/do-illegal-votes-decide-elections-1480551000.

#### C. Offices and Logistics of the Pence-Kobach Commission

- 47. The office location and address of the Pence-Kobach Commission has not been made public.
- 48. The Pence-Kobach Commission's Designated Federal Officer is an Associate Counsel in the Office of the Vice President, which is an office within the Executive Office of the President. The offices of the Office of the Vice President are primarily located within the Eisenhower Executive Office Building ("EEOB").
- 49. The EEOB is not generally open to members of the public. In order to enter the EEOB, a visitor must have a set meeting with a particular person in the building, who must enter the full name, Social Security Number, date of birth, citizenship status, country of birth, gender, and city and state of residence of each visitor into the White House Worker and Visitor Entry System ("WAVES"), maintained by the United States Secret Service, for review and approval prior to entry.
- 50. The names of the staff of the Pence-Kobach Commission have not been made public. The Commission is apparently staffed by employees of the Executive Office of the President. *See* Dave Boyer, *Voter Fraud and Suppression Commission to Meet in July*, Wash. Times (June 27, 2017), http://www.washingtontimes.com/news/2017/jun/27/voter-fraud-and-suppression-commission-to-meet-in-/ [hereinafter Boyer, *Voter Fraud and Suppression*].
- 51. On July 1, 2017, a reporter for ProPublica requested for, the fifth time, a full list of staff working for the Commission. On information and belief, she has still not received a response.

#### III. Activities of the Pence-Kobach Commission

52. On June 28, 2017, Vice President Pence, as chair of the Pence-Kobach

Commission, held a telephonic meeting with the members of the Commission. *See* Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/06/28/readout-vice-presidents-call-presidential-advisory-commission-election [hereinafter Pence Release].

- 53. The meeting lasted for ninety minutes. *See* John DiStaso, *NH Primary Source: Gardner Says Trump Election Integrity Commission Call "Couldn't Have Been Better"*, WMUR

  9 ABC (June 29, 2017), http://www.wmur.com/article/gardner-says-trump-election-integrity-commission-call-couldnt-have-been-better/10237642.
- 54. This meeting of the Pence-Kobach Commission was not noticed in the Federal Register nor was it held open to the public. Upon information and belief, the agenda for the June 28 meeting was not made available for public inspection and copying, nor were any of the documents provided to the members in relation to the meeting. The meeting was therefore unlawful.
- 55. The June 28 meeting was not merely an administrative or preparatory meeting. During that meeting, the Pence-Kobach Commission discussed substantive issues and made substantive decisions. It was not conducted solely to prepare for a future advisory committee meeting, to draft a position paper, or to discuss merely administrative matters.
- 56. During this unlawful telephonic meeting, Vice Chair Kobach told the members of the Commission that he was sending a letter "to the 50 states and District of Columbia on behalf of the Commission requesting publicly-available data from state voter rolls and feedback on how to improve election integrity." Pence Release.

- 57. During this unlawful meeting, the members of the Pence-Kobach Commission discussed issues of substance, including the potential number of double registrants and how to identify such registrations. Celeste Katz, *Trump Election Integrity Commission Member: 'We Should Have Predicted' the Backlash*, Mic (July 5, 2017), https://mic.com/articles/181510/trump-election-integrity-commission-member-we-should-have-predicted-the-backlash#. FJyGiAIZO.
- 58. Subsequent to the unlawful meeting, Commission member Secretary Dunlap reported that during the meeting, in regard to sending such letters to the states, he had advised the Commission, "to be careful how you go at this because election officials are very sensitive guardians of this information, so you want to make sure you're asking for it, not demanding it, and that it really should only cover the information that is publicly available in your state." Sam Levine, *Trump Voter Fraud Commission Was Cautioned About Seeking Sensitive Voter Information*, Huffington Post (July 5, 2017), http://www.huffingtonpost.com/entry/trump-voter-fraud-commission\_us\_595d511fe4b02e9bdb0a073d [hereinafter Levine, *Commission Was Cautioned*].
- 59. At the unlawful meeting, the Commission reportedly deliberated and concluded that they did not need to review the language of the letters to the states because only Vice Chair Kobach would sign them. Levine, *Commission Was Cautioned*; *see also* Tal Kopan, *Pence-Kobach Voting Commission Alarms States with Info Request*, CNN (July 1, 2017), http://www.cnn.com/2017/06/30/politics/kris-kobach-voter-commission-rolls/index.html (citing statements from Commission member, Secretary Dunlap of Maine, and spokesperson for Vice President Pence, Marc Lotter).

- 60. Subsequent to the Commission's determination that the Commissioners did not need to review Vice Chair Kobach's letter, on June 28, 2017, Vice Chair Kobach sent a letter to the Secretary of State of each of the fifty states and to the District of Columbia requesting submission via e-mail or FTP site by July 14, 2017, of voter roll data, including "the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information." See, e.g., Letter from Kris Kobach to Elaine Marshall, North Carolina Secretary of State (June 28, 2017), https://assets.documentcloud.org/documents/3881856/Correspondence-PEIC-Letter-to-North-Carolina.pdf; see also Pence Release; Brandon Carter, Trump Election Panel Asks All 50 States http://thehill.com/homenews/ Voter Roll Data. The Hill (June 29, 2017), for administration/340117-trump-election-integrity-commission-requests-years-of-voter-data-from.
- 61. Underscoring the need for public oversight, Vice Chair Kobach's request was of such public concern that officials in 48 states have partially or fully refused to comply with the request. *See* Ari Berman, *Suppression Plans are Backfiring Badly*, The Nation (July 5, 2017), https://www.thenation.com/article/the-trump-administrations-voter-suppression-plans-are-backfiring-badly/.
- 62. Cybersecurity experts have described the Commission's plans to aggregate this data as a "gold mine" for hackers. Eric Geller & Corey Bennett, *Trump Voter-Fraud Panel's Data Request a Gold Mine for Hackers, Experts Warn*, Politico (July 1, 2017), http://www.politico.com/story/2017/07/01/trump-voter-fraud-panel-hackers-240168. Michael

Chertoff, the former Secretary of Homeland Security under President George W. Bush, has written an op-ed titled "Trump's Voter Data Request Poses an Unnoticed Danger," noting that "whatever the political, legal and constitutional issues raised by this data request, one issue has barely been part of the public discussion: national security." Michael Chertoff, Trump's Voter Data Unnoticed Danger, Wash. Request Poses an Post (July 2017), https://www.washingtonpost.com/opinions/trumps-voter-data-request-poses-an-unnoticeddanger--to-national-security/2017/07/05/470efce0-60c9-11e7-8adc-fea80e32bf47\_story.html? utm term=.47ed19183852.

- 63. On July 5, 2017, a planned July 19, 2017 in-person meeting of the Pence-Kobach Commission was noticed in the Federal Register, 14 days prior to the scheduled meeting. The Presidential Commission on Election Integrity (PCEI); Upcoming Public Advisory Meeting, 82 Fed. Reg. 31063 (July 5, 2017) [hereinafter Meeting Notice].
- 64. The notice stated that the meeting would be held in the EEOB and would be available to the public only through an internet livestream. Meeting Notice, 82 Fed. Reg. 31063.
- 65. Notwithstanding the fact that the Commission has not yet had a lawful public meeting, its work has already begun. On July 5, 2017, Vice Chair Kobach publicly declared under penalty of perjury that "information [had been] provided to [him] in [his] official capacity as Vice Chair of the Commission." Decl. of Kris Kobach, Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, No. 17-cv-1320 (CKK) (D.D.C. July 5, 2017), ECF No. 8-1 [hereinafter Kobach Declaration]. Vice Chair Kobach did not identify what information contained in his declaration was provided to him in his capacity as Co-Chair, nor did he identify who provided the information, or in what form.

- 66. Also on July 5, 2017, spokesperson for Vice President Pence, Marc Lotter, stated that the Pence-Kobach Commission had already formulated plans for the voter data that it is collecting, explaining that the Commission intended to check the information contained in state voter rolls against data housed in various federal databases to identify supposedly ineligible registrants. That determination was made before any lawful meetings of the Pence-Kobach Commission had been held. Jessica Huseman, *Election Experts See Flaws in Trump Voter Commission's Plan to Smoke Out Fraud*, ProPublica (July 6, 2017), https://www.propublica.org/article/election-experts-see-flaws-trump-voter-commissions-plan-to-smoke-out-fraud. Mr. Lotter would not specify which federal databases the Commission intended to use, but public reports from June 27, 2017 indicated that the Commission intended to compare state voter roll data against the federal database of non-citizens, which would lead to numerous false positive matches. *Id.* (citing Boyer, *Voter Fraud and Suppression*).
- 67. Election administration experts have stated that running such a comparison is certain to lead to numerous false positives due to minor inaccuracies on the voter rolls, inconsistencies in data collection and formatting, and the reality of common names and birthdays. *See id.*; Maggie Koerth-Baker, *Trump's Voter Fraud Commission is Facing a Tough Data Challenge*, FiveThirtyEight, July 7, 2017, https://fivethirtyeight.com/features/trumps-voter-fraud-commission-is-facing-a-tough-data-challenge/.
- 68. Indeed, Secretary Kobach currently operates an "Interstate Crosscheck" system, which purports to compare voter registration files in multiple states to search for double voters. But a team of researchers from Stanford, Harvard, the University of Pennsylvania, and Microsoft concluded that, if Secretary Kobach's Crosscheck system were used for voter list maintenance in one state (Iowa), 99.5% of the purported matches would be false positives, such

that "200 legitimate voters may be impeded from voting for every double vote stopped." *See* Sharad Goel et al., One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections, (Jan. 13, 2017), https://5harad.com/papers/1p1v.pdf.

- 69. On July 5, 2017, Plaintiffs requested that the Pence-Kobach Commission produce or make available for public inspection and copying all materials "which were made available to or prepared for or by" the Commission. As of the date of this Complaint, Plaintiffs have not received a response to this request.
- 70. Defendants continue to disclaim that the Pence-Kobach Commission is subject to FACA. Memorandum in Opposition to Plaintiff's Emergency Motion for a Temporary Restraining Order at 12, Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, No. 17-cv-1320 (CKK) (D.D.C. July 5, 2017), ECF No. 8.

#### **CLAIMS FOR RELIEF**

- 71. District courts are authorized to issue relief in the nature of mandamus compelling federal officials to perform ministerial or nondiscretionary duties. 28 U.S.C. § 1361. Ministerial or nondiscretionary duties are those "so plainly prescribed as to be free from doubt and equivalent to a positive command." *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930).
- 72. All of the duties mandated by FACA, as described in paragraphs 12-13 and 16-18, above, are "equivalent to a positive command," each using the word "shall" to lay out a mandatory duty. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 43 (D.D.C. 2002) ("by virtue of the use of the word shall, Congress has made [the duty] nondiscretionary").

73. Where statutory duties are violated, courts may also act pursuant to the Declaratory Judgment Act as an alternative or in addition to granting mandamus relief. *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 222 (D.D.C. 2009).

#### **First Claim for Relief**

(For Relief in the Nature of Mandamus, as provided for by 28 U.S.C. § 1361, Compelling Defendants Vice President Pence and the Pence-Kobach Commission to Comply with their Non-Discretionary Duties of Section 10 of FACA, 5 U.S.C. app. 2 § 10)

- 74. By holding a telephonic meeting of the Pence-Kobach Commission, without providing advance notice in the Federal Register, and by not holding the meeting open to the public or providing an option for public comment, the Vice President and the Pence-Kobach Commission have failed to carry out the non-discretionary openness requirements of § 10(a)(1)-(3) of FACA.
- 75. By failing to create "[d]etailed minutes" of the June 28, 2017 meeting of the Pence-Kobach Commission, the Vice President and the Pence-Kobach Commission have failed to carry out the non-discretionary openness requirements of § 10(c) of FACA.
- 76. By failing to make available all "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Pence-Kobach Commission for the June 28, 2017 meeting to the public for "inspection and copying at a single location" within the office of the Commission, including by failing to make public the location of the office of the Pence-Kobach Commission, and to the extent the Commission office is contained within the Office of the Vice President, by keeping the documents in an office largely closed to public access, the Vice President and the Pence-Kobach Commission have failed to carry out the non-discretionary openness requirements of § 10(b) of FACA.

- 77. By failing to provide a transcript of the June 28, 2017 telephonic meeting of the Pence-Kobach Commission at the cost of duplication, the Vice President and the Pence-Kobach Commission have failed to carry out the non-discretionary requirements of § 11(a) of FACA.
- 78. By failing to make available all "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Pence-Kobach Commission since its inception, to the public for "inspection and copying at a single location" within the office of the Commission, including by failing to make public the location of the office of the Pence-Kobach Commission, and to the extent the Commission office is contained within the Office of the Vice President, by keeping the documents in an office largely closed to public access, the Vice President and the Pence-Kobach Commission have failed to carry out the non-discretionary openness requirements of § 10(b) of FACA.
- 79. By failing to make available the agenda and all documents made available to and/or prepared for or by the Pence-Kobach Commission members in advance of the July 19, 2017 meeting to the public for inspection and copying, including by failing to make public the location of the office of the Pence-Kobach Commission, and to the extent the Commission office is contained within the Office of the Vice President, by keeping the documents in an office largely closed to public access, the Vice President and the Pence-Kobach Commission have failed to carry out the non-discretionary openness requirements of § 10(b) of FACA.
- 80. By failing to make available all documents provided to Secretary Kobach in his "official capacity as Vice-Chair of the Commission," *see* Kobach Declaration ¶ 2, to the public for "inspection and copying at a single location" within the office of the Commission, the Vice

President and the Pence-Kobach Commission have failed to carry out the non-discretionary openness requirements of § 10(b) of FACA.

81. By holding the July 19 meeting of the Pence-Kobach Commission in a building that is closed to the public without advanced screening and by not permitting the public to physically access the July 19 meeting of the Pence-Kobach Commission, the Vice-President and the Pence-Kobach Commission have failed to carry out the non-discretionary open meeting requirement of § 10(a)(1) of FACA.

#### **Second Claim for Relief**

(For Relief in the Nature of Mandamus, as provided for by 28 U.S.C. § 1361, Compelling Defendant President Trump to Comply with his Non-Discretionary Duties of Section 5 of FACA, 5 U.S.C. app. 2 § 5)

- 82. In stacking the Commission with individuals who have already publicly supported President Trump's false statements regarding purported illegal voting, demonstrating the Pence-Kobach Commission membership is predisposed to a particular conclusion without yet having done the work to study the issues as contemplated in the Executive Order, and purportedly balancing them with members with little or no experience, President Trump has not "require[d] the membership of the advisory committee . . . be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee," which is a non-discretionary duty under FACA. 5 U.S.C. app. 2 § 5(b)(2).
- 83. In appointing Secretary of State Kobach, who publicly affirmed President Trump's claims of voter fraud without evidence, as co-chair of the Commission, President Trump has not made "appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority" which is a non-discretionary duty under FACA. 5 U.S.C. app. 2 § 5(b)(3).

84. In appointing members von Spakovsky, Blackwell, Gardner, and McCormick, President Trump has not made "appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority," which is a non-discretionary duty under FACA. 5 U.S.C. app. 2 § 5(b)(3). Commissioners von Spakovsky and Blackwell have each publicly affirmed the existence of massive numbers of "illegal votes," in line with the narrative of President Trump in the creation of the Pence-Kobach Commission. Commissioner Gardner has likewise made unfounded claims about illegal voting, and Commissioner McCormick has supported policies and practices that have disenfranchised voters.

# Third Claim for Relief (For Declaratory Judgment, as provided for by 28 U.S.C. § 2201-02, that Defendants Are in Violation of FACA, 5 U.S.C. §§ 5, 10)

- 85. All meetings of the Pence-Kobach Commission, including those conducted through an electronic medium, must be open to the public; by conducting a telephonic meeting on June 28, 2017, without public access, Vice President Pence and the Pence-Kobach Commission violated § 10(a)(1), (3) of FACA.
- 86. All meetings of the Pence-Kobach Commission must be noticed in advance in the Federal Register; by conducting a telephonic meeting on June 28, 2017, without public access, Vice President Pence and the Pence-Kobach Commission violated § 10(a)(2) of FACA.
- 87. By failing to create "[d]etailed minutes" of the June 28, 2017 meeting of the Pence-Kobach Commission, the Vice President and the Pence-Kobach Commission violated § 10(c) of FACA.
- 88. By failing to make available all "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made

available to or prepared for or by" the Pence-Kobach Commission—including those documents related to the June 28, 2017 telephonic meeting, related to the planned July 19, 2017 meeting, made available to Vice Chair Kobach in his "official capacity as Vice-Chair of the Commission," and all other Commission documents—to the public for "inspection and copying at a single location" within the office of the Commission, including by failing to make public the location of the office of the Pence-Kobach Commission, and to the extent the Commission office is contained within the Office of the Vice President, by keeping the documents in an office largely closed to public access, the Vice President and the Pence-Kobach Commission violate § 10(b) of FACA.

- 89. By not permitting the public to physically access the July 19 meeting of the Pence-Kobach Commission, and ensuring this is the case by holding the July 19 meeting of the Pence-Kobach Commission in a building that is closed to the public without advanced screening and notice of individual attendance, the Vice-President and the Pence-Kobach Commission violate § 10(a)(1) of FACA.
- 90. By appointing commissioners who have already publicly supported President Trump's conclusion regarding purported illegal voting, demonstrating the Pence-Kobach Commission membership is predisposed to a particular conclusion without yet having done the work to study the issues as contemplated in the Executive Order, and purportedly balancing them with members having little or no experience or knowledge about the subject matter, and who have never held similarly high political offices, President Trump has not "require[d] the membership of the advisory committee . . . be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee," in violation of § 5(b)(2).

- 91. By failing to make any "appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment," President Trump has violated § 5(b)(3) of FACA.
- 92. Plaintiffs are entitled to a declaration under 28 U.S.C. § 2201 that the foregoing conduct violates FACA.

#### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

- (1) Grant relief in the nature of mandamus compelling Defendants to perform all nondiscretionary duties required by FACA, including:
  - a. requiring that Vice President Pence and the Pence-Kobach Commission hold all meetings of the Commission, including meetings conducted by telephone or other electronic medium, open to the public. 5 U.S.C. app. 2 § 10(a)(1);
  - b. requiring that Vice President Pence and the Pence-Kobach Commission publish timely notice in the Federal Register of every meeting of the Pence-Kobach Commission.
     5 U.S.C. app. 2 § 10(a)(2);
  - c. requiring that the Pence-Kobach Commission keep "[d]etailed minutes" of each meeting.
     5 U.S.C. app. 2 § 10(c);
  - d. requiring that "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [the Pence-Kobach Commission] shall be available for public inspection and copying." 5 U.S.C. app. 2 § 10(b);

- e. requiring that the Pence-Kobach Commission "make available to any person, at actual cost of duplication, copies of transcripts" of each meeting and proceeding.
  5 U.S.C. app. 2 § 11(a);
- f. requiring that President Trump "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. app. 2 § 5(b)(2);
- g. requiring that President Trump make "appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment." 5 U.S.C. app. 2 § 5(b)(3).
- (2) Declare that the Defendants have violated §§ 5 and 10 of FACA, including:
  - a. that Vice President Pence and the Pence-Kobach Commission violated § 10(a)(1),(3) of FACA by holding the June 28, 2017 meeting of the Pence-Kobach Commission;
  - b. that Vice President Pence and the Pence-Kobach Commission violated § 10(a)(2)
     of FACA by holding the June 28, 2017 meeting of the Pence-Kobach
     Commission without first publishing advance notice in the Federal Register;
  - c. that the Vice President and the Pence-Kobach Commission violated § 10(c) of FACA by failing to create "detailed minutes" of the June 28, 2017 meeting of the Pence-Kobach Commission;
  - d. that the Vice President and the Pence-Kobach Commission violate § 10(b) of FACA by failing to make available all the Pence-Kobach Commission

documents—including those documents related to the June 28, 2017 telephonic meeting, related to the planned July 19, 2017 meeting, made available to Vice Chair Kobach in his "official capacity as Vice-Chair of the Commission," and all other Commission documents—to the public for "inspection and copying at a single location" within the office of the Commission, including by failing to make public the location of the office of the Pence-Kobach Commission, and to the extent the Commission office is contained within the Office of the Vice President, by keeping the documents in an office largely closed to public access;

- e. that the Vice-President and the Pence-Kobach Commission violate § 10(a)(1) of FACA by not permitting the public to physically access the July 19 meeting of the Pence-Kobach Commission, and ensuring this is the case by holding the July 19 meeting of the Pence-Kobach Commission in a building that is closed to the public without advanced screening and notice of individual attendance;
- f. that President Trump has violated § 5(b)(2) of FACA by failing to "require the membership of the advisory committee . . . be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;" and
- g. that President Trump has violated § 5(b)(3) of FACA by not making any provision "to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment.

(3) Grant any other relief, including injunctive relief, that the Court may deem just and proper.

Respectfully submitted,

#### /s/ Dale E. Ho

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Dated: July 10, 2017

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al.	)	
Plaintiffs,	)	
v.	)	No.
DONALD TRUMP, et al.	)	
Defendants.	)	

## PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (together, the "ACLU"), pursuant to Federal Rules of Civil Procedure 7 and 65, and Local Rule of the U.S. District Court for the District of Columbia 65.1, respectfully request that this Court enter a temporary restraining order and/or a preliminary injunction compelling Defendants, in advance of the planned July 19 meeting of the Presidential Advisory Commission on Election Integrity ("Pence-Kobach Commission"), to comply with the mandatory transparency requirements of Section 10 of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 § 10, as set forth in Claim 1 of their Complaint.

On May 11, 2017, after asserting for months that he had "won the popular vote if you deduct the millions of people who voted illegally," President Trump established the Pence-Kobach Commission, an advisory committee subject to the terms of FACA, 5 U.S.C. app. 2 § 3(2). The Commission's purported "mission" is to "study the registration and voting processes used in Federal elections." Exec. Order No. 13,799, § 3. But the

context surrounding the Commission's creation, its makeup, and its lack of transparency to date raise questions as to the integrity of this Commission—and underscore the critical need for public oversight. This is all the more true given the profound significance of the privacy and voting rights at issue. The Pence-Kobach Commission is now poised to make findings and recommendations that touch upon these fundamental rights.

Defendants, however, have failed to comply with non-discretionary responsibilities under FACA designed to ensure the transparency needed for the public to monitor the Pence-Kobach Commission effectively and to hold it accountable. *See Ctr. for Law & Educ. v. U.S. Dep't of Educ.*, 209 F. Supp. 2d 102, 113 (D.D.C. 2002), *aff'd* 396 F.3d 1152 (D.C. Cir. 2005); *see also Food Chem. News, Inc. v. Davis*, 378 F. Supp. 1048, 1051 (D.D.C. 1974). Specifically, the Commission: (1) held a substantive meeting without advance notice and without opening it to the public; (2) has not made its office location public, nor released all documents "which were made available to or prepared for or by" the Commission; and (3) intends to hold its second meeting in a building inaccessible to the public. Each of these actions is a violation of FACA.

In order to ensure compliance with statutorily-mandated transparency and public accountability requirements, and to allow the ACLU, its members, and other members of the public to have meaningful oversight and the opportunity for informed participation as provided by FACA in the next meeting of the Commission, the ACLU respectfully requests that the Court compel Defendants, in advance of the Commission's planned July 19 meeting, to: (1) ensure that any telephonic meetings held by the Commission comply with the notice and public access requirements of FACA; (2) make available for public inspection and copying at a single, publically accessible location all minutes, agendas,

reports, studies and documentary material made available to or prepared for or by Commission members; and (3) provide physical access to the July 19 meeting by moving it, with public notice, to a publically-accessible location. If Defendants cannot comply with the requirements of FACA prior to the July 19 meeting, the ACLU requests that any meetings of the Pence-Kobach Commission be enjoined until such compliance with these non-discretionary openness requirements is achieved. This Application is supported by the attached Memorandum in Support of Plaintiffs' Application for a Temporary Restraining Order and/or Preliminary Injunction.

As demonstrated by the accompanying Certificate of Counsel, Defendants have received notice of the time and making of this application, and copies of all pleadings and papers filed have been provided to Defendants, pursuant to Fed. R. Civ. P. 65.1(a).

Respectfully submitted,

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### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al.	)	
Plaintiffs,	)	
v.	)	No.
DONALD TRUMP, et al.	)	
Defendants.	) ) )	

# MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (together, the "ACLU") have moved for a Temporary Restraining Order and/or a Preliminary Injunction with respect to Claim 1 of their Complaint, and submit the following memorandum in support of that motion.

#### **INTRODUCTION**

For months before the 2016 general election, candidate Donald Trump declared repeatedly that the election was "rigged" and voiced support for laws designed to limit access to the vote. Shortly after the election, despite official results demonstrating the contrary, President-elect Trump tweeted, "In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally," a position he has continued to assert in the months since. Leaders on all

<sup>&</sup>lt;sup>1</sup> See David Weigel, For Trump, A New 'Rigged' System: The Election Itself, Wash. Post (Aug. 2, 2016), https://www.washingtonpost.com/politics/for-trump-a-new-rigged-system-the-election-itself/2016/08/02/d9fb33b0-58c4-11e6-9aee-8075993d73a2\_story.html?utm\_term=.bc4164b38b10.

<sup>&</sup>lt;sup>2</sup> See Donald Trump (@realDonaldTrump), Twitter (Nov. 27, 2017, 12:30 PM), https://twitter.com/realDonaldTrump/status/802972944532209664.

sides of the political spectrum, including Speaker of the House Paul Ryan, have rejected this baseless and self-serving claim.<sup>4</sup> Indeed, President Trump's own legal team argued that "[a]ll available evidence suggests that the 2016 general election was *not* tainted by fraud or mistake."<sup>5</sup> But one stalwart defender, Kansas Secretary of State Kris Kobach, stated that he thinks that President Trump "is absolutely correct when he says the number of illegal votes cast exceeds the popular vote margin between him and Hillary Clinton at this point."<sup>6</sup>

Against this backdrop, President Trump created the Presidential Advisory Commission on Election Integrity ("Pence-Kobach Commission"), appointing Vice President Pence as its Chairman and Secretary Kobach as its Vice Chairman. The Commission's purported "mission" is to "study the registration and voting processes used in Federal elections." Exec. Order No. 13,799, § 3, 82 Fed. Reg. 22,389 (May 11, 2017). But the context surrounding the Commission's creation, its makeup, and its lack of transparency to date raise questions as to the integrity of this Commission—and underscore the critical need for public oversight. This is all the more true given the

<sup>&</sup>lt;sup>3</sup> See, e.g., Charles Ventura, *Trump Revives False Claim That Illegal Ballots Cost Him Popular Vote*, USA Today (Jan. 23, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/01/23/president-trump-illegal-ballots-popular-vote-hillary-clinton/96976246/; Aaron Blake, *Donald Trump Claims None of Those 3 to 5 Million Illegal Votes Were Cast for Him. Zero.*, Wash. Post (Jan. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/donald-trump-claims-none-of-those-3-to-5-million-illegal-votes-were-cast-for-him-zero/?tid=a\_inl&utm\_term=.1e862115ce52.

<sup>&</sup>lt;sup>4</sup> See, e.g., Scott Wong, Ryan: 'No Evidence' of Mass Voter Fraud as Trump Claimed, The Hill (Jan. 24, 2017), http://thehill.com/homenews/house/315844-ryan-no-evidence-of-mass-voter-fraud-as-trump-claimed; Frank Thorp V & Corky Siemaszko, Lindsey Graham to Trump: Stop Claiming 'Illegals' Cost You Popular Vote, NBC News (Jan. 24, 2017), http://www.nbcnews.com/politics/2016-election/gop-senator-president-trump-stop-claiming-illegals-cost-you-popular-n711386.

<sup>&</sup>lt;sup>5</sup> Donald J. Trump and Donald J. Trump for President, Inc.'s Objs. to Dr. Jill Stein's Recount Pet. at 2, In re Pet. for Recount for the Office of President of the United States of America (Mich. Bd. of State Canvassers Dec. 1, 2016), *available at* https://www.michigan.gov/documents/sos/Objection\_to\_Recount\_Petition\_544089\_7.pdf.

<sup>&</sup>lt;sup>6</sup> Hunter Woodall, *Kris Kobach Agrees with Donald Trump that 'Millions' Voted Illegally But Offers No Evidence*, Kan. City Star (Nov. 30, 2016), http://www.kansascity.com/news/politics-government/article117957143.html.

profound significance of the rights at issue. The Commission has announced its intention to collect and aggregate data on every registered voter in America in a matter of days—an unprecedented act—and has offered no details as to the security of that data or how it will ensure the privacy of voters. And, of course, "voting is of the most fundamental significance under our constitutional structure." *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). *See also Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). The Pence-Kobach Commission is now poised to make findings and recommendations that touch upon this most fundamental right.

The Pence-Kobach Commission seeks to do so with minimal public oversight. The Vice President and the Pence-Kobach Commission have failed to comply with their non-discretionary responsibilities under the Federal Advisory Commission Act ("FACA"), 5 U.S.C. app. 2 §§ 1-16, designed to ensure the transparency needed for the public to monitor advisory committees, such as the Pence-Kobach Commission, effectively and to hold them accountable. *See Ctr. for Law & Educ. v. U.S. Dep't of Educ.*, 209 F. Supp. 2d 102, 113 (D.D.C. 2002), *aff'd* 396 F.3d 1152 (D.C. Cir. 2005) (principal purpose of FACA is to enhance public accountability of federal advisory committees); *see also Food Chem. News, Inc. v. Davis*, 378 F. Supp. 1048, 1051 (D.D.C. 1974) (purpose of FACA is "to control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals").

The Commission has already held a meeting without advance notice and without opening it to the public—a meeting that was more than merely organizational and

preparatory—at which numerous substantive decisions were made.<sup>7</sup> The Commission has also not made its office location public, nor released all documents "which were made available to or prepared for or by" the Commission since its inception. Equally troubling in moving forward, the Commission intends to hold its second meeting in a building inaccessible to the public, only allowing for a non-interactive internet livestream, a method notably inaccessible to citizens without access to a computer and broadband internet. Each of these actions is a violation of FACA. And while the Commission has purported to make minor gestures towards transparency, it has specifically reserved the right not to comply with federal law, stating in a memorandum filed in this Court last week that it "do[es] not concede that FACA applies" to the Commission.<sup>8</sup>

In order to ensure compliance with statutorily-mandated transparency and public accountability requirements, and to allow the ACLU, its members, and other members of the public to have meaningful oversight and the opportunity for informed participation as provided for by FACA in the next meeting of the Commission, the ACLU respectfully requests that the Court compel Defendants, in advance of the July 19 meeting, to:

(1) ensure that any telephonic meetings held by the Commission comply with the notice

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<sup>&</sup>lt;sup>7</sup> See, e.g., Celeste Katz, *Trump Election Integrity Commission Member:* 'We Should Have Predicted' the Backlash, Mic (July 5, 2017), https://mic.com/articles/181510/trump-election-integrity-commission-member-we-should-have-predicted-the-backlash#.FJyGiAIZO (discussed the potential number of double registrants and how to identify such registrations); Sam Levine, *Trump Voter Fraud Commission Was Cautioned About Seeking Sensitive Voter Information*, Huffington Post (July 5, 2017), thttp://www.huffingtonpost.com/entry/trump-voter-fraud-commission\_us\_595d511fe4b02e9bdb0a073d (noting that one Commissioner advised the Commission "to be careful how you go at this because election officials are very sensitive guardians of this information, so you want to make sure you're asking for it, not demanding it, and that it really should only cover the information that is publicly available in your state"); Decl. of Kris Kobach, Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, No. 17-cv-1320 (D.D.C. July 5, 2017), ECF No. 8-1 (commission will store materials on White House computers).

<sup>&</sup>lt;sup>8</sup> Mem. in Opp. to Pl.'s Emergency Mot. for Temp. Restraining Order at 12, Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, No. 17-cv-1320 (D.D.C. July 5, 2017), ECF No. 8.

and public access requirements of FACA; (2) make available for public inspection and copying at a single, publically accessible location all minutes, agendas, reports, studies and documentary material made available to and/or prepared for or by Commission members; and (3) provide physical access to the July 19 meeting by moving it, with public notice, to a publically-accessible location. If Defendants cannot comply with the requirements of FACA prior to the July 19 meeting, the ACLU requests that any meetings of the Pence-Kobach Commission be enjoined until such compliance with these non-discretionary openness requirements is achieved.

#### FACTUAL BACKGROUND

## I. The Federal Advisory Commission Act

Congress enacted FACA, 5 U.S.C. app. 2 §§ 1-16, to open federal advisory committees to public scrutiny and accountability. See Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 446 (1989) (stating that purpose of FACA was to ensure, among other things, "that Congress and the public remained apprised of [advisory committees'] existence, activities, and cost"); Ctr. for Law & Educ., 209 F. Supp. 2d at 113; Food Chem. News, 378 F. Supp. at 1051. While recognizing that advisory committees can serve an important function in providing advice and ideas, Congress was particularly concerned with "prevent[ing] 'subjective influences not in the public interest' from controlling the meetings." Food Chem. News v. Dep't of Health & Human Servs., 980 F.2d 1468, 1472 (D.C. Cir. 1992) (quoting S. Rep. No. 92-1098, at 6 (1972)). FACA applies (with exceptions not relevant here) to "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . established or utilized by the President . . . in the interest of obtaining advice or recommendations for the President," denominating such groups as

"advisory committees." 5 U.S.C. app. 2 § 3(2); see also Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983) (presidential committees must comply with requirements of FACA).

To achieve its goals of accountability and transparency, FACA requires that advisory committees comply with a host of procedures designed to ensure the transparency needed for the public to monitor such committees effectively and to hold them accountable. See Cummock v. Gore, 180 F.3d 282, 284-85 (D.C. Cir. 1999) (noting Congress' concern with special interests on advisory committees "seeking to advance their own agendas" and that in enacting FACA, "Congress aimed, in short, . . . to open to public scrutiny the manner in which government agencies obtain advice from private individuals" (internal quotation marks and citations omitted)). All advisory committee meetings must be open to the public<sup>9</sup> and must be timely noticed in the Federal Register at least fifteen days before the meeting is held. 5 U.S.C. app. 2 § 10(a)(1)-(2); 41 C.F.R. § 102-3.150(a). Interested members of the public must "be permitted to attend, appear before, or file statements with any advisory committee," subject only to "reasonable" regulations set by the Administrator of General Services. 5 U.S.C. app. 2 § 10(a)(3). These regulations require that each advisory committee meeting be "held at a reasonable time and in a manner or place reasonably accessible to the public," in a place sufficient to accommodate "a reasonable number of interested members of the public." 41 C.F.R. § 102-3.140(a)-(b). If an advisory committee meeting is held via teleconference, videoconference, or other electronic medium, it still must be made accessible to the public. 41 C.F.R. § 102-3.140(e).

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<sup>&</sup>lt;sup>9</sup> Although portions of meetings may be closed where the President determines that closure is provided for pursuant to 5 U.S.C. § 552b(c) (the federal Open Meetings statute), any such determination must be made in writing and set forth the reasons for the conclusion. 5 U.S.C. app. 2 § 10(d).

FACA also requires that, subject to the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports." 5 U.S.C. app. 2 § 10(b). "Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee." 5 U.S.C. app. 2 § 10(c). And advisory committees must make available copies of transcripts of advisory committee meetings to "any person" at only the "actual cost of duplication." 5 U.S.C. app. 2 § 11(a).

These requirements of FACA are mandatory on the appointing authority, in this case, President Trump, and on the advisory committee itself.

## II. The Creation of the Pence-Kobach Commission

President Trump lost the popular vote in the 2016 Presidential Election. The official results indicated that 65,853,516 votes were cast for the Democratic nominee, Hillary Rodham Clinton, and 62,984,825 votes were cast for the Republican nominee, Donald J. Trump. With respect to the Electoral College, the official results indicated that 227 and 304 Electoral College votes were cast for Democratic nominee Clinton and Republican nominee Trump, respectively. Shortly thereafter, on November 27, 2016, President-elect Trump tweeted, "In addition to winning the Electoral College in a

<sup>&</sup>lt;sup>10</sup> Federal Election Commission, Official 2016 Presidential General Election Results (Jan. 30, 2017), *available at* https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf.

landslide, I won the popular vote if you deduct the millions of people who voted illegally."<sup>11</sup> In the months since, President Trump has continued to assert that millions of purportedly "illegal votes" cost him the popular vote. <sup>12</sup>

Following the election, on November 20, 2017, President-elect Trump met with Kansas Secretary of State, and now Vice Chair of the Pence-Kobach Commission, Kris Kobach. Outside this meeting, Secretary Kobach was photographed holding a document that appeared to reference proposed amendments to the National Voter Registration Act. Secretary Kobach has long sought to relieve himself of the requirements of the NVRA, which have prevented him from fully enforcing restrictions on voting that, had they been implemented, would have disenfranchised thousands of qualified voters in Kansas. See Fish v. Kobach, 840 F.3d 710, 754 (10th Cir. 2016) (finding that Secretary Kobach's documentary proof of citizenship requirement risked the "imminent disenfranchisement of over 18,000 Kansans" who had registered to vote at DMV offices); League of Women Voters of the U.S. v. Newby, 838 F.3d 1, 12-13 (D.C. Cir. 2016)

<sup>&</sup>lt;sup>11</sup> See Donald Trump (@realDonaldTrump), Twitter (Nov. 27, 2017, 12:30 PM), https://twitter.com/realDonaldTrump/status/802972944532209664.

<sup>&</sup>lt;sup>12</sup> See, e.g., Charles Ventura, *Trump Revives False Claim That Illegal Ballots Cost Him Popular Vote*, USA Today (Jan. 23, 2017), https://www.usatoday.com/story/news/politics/onpolitics/2017/01/23/president-trump-illegal-ballots-popular-vote-hillary-clinton/96976246/; Aaron Blake, *Donald Trump Claims None of Those 3 to 5 Million Illegal Votes Were Cast for Him. Zero.*, Wash. Post (Jan. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/donald-trump-claims-none-of-those-3-to-5-million-illegal-votes-were-cast-for-him-zero/?tid=a inl&utm term=.1e862115ce52.

<sup>&</sup>lt;sup>13</sup> See, e.g., Peter Hancock, Kobach Ordered To Turn Over Document He Used in Meeting with Trump, Lawrence J.-World (Apr. 5, 2017), http://www2.ljworld.com/news/2017/apr/05/kobach-ordered-turn-over-document-he-used-meeting-/; see also Order, Fish v. Kobach, No. 16-cv-2105-JAR-JPO (D. Kan. Apr. 17, 2017), ECF No. 320; Order, Fish v. Kobach, No. 16-cv-2105-JAR-JPO (D. Kan. June 23, 2017), ECF No. 355.

<sup>&</sup>lt;sup>14</sup> See, e.g., Letter to Anne Miller, Acting Exec. Dir., Election Assistance Comm'n, from Kris Kobach, Kan. Secretary of State (June 18, 2013), available at https://www.eac.gov/assets/1/28/KWK%20to%20EAC%206-18-OCR.pdf; Complaint, Kobach v. Election Assistance Comm'n, No. 13-cv-4095 (D. Kan. Aug. 21, 2013), ECF No. 1; Kobach's Column, Kris Kobach, Kan. Secretary of State (Mar. 11, 2011) (noting Secretary Kobach's office "draft[ed] and advocat[ed] passage of" the SAFE Act), available at https://www.kssos.org/other/news\_releases/PR\_2011/Kobach%27s\_Column\_3-11-2011.pdf.

(finding that the same requirements, as applied to voters who registered using the federal voter registration form, created "a substantial risk that citizens will be disenfranchised in the present federal election cycle," and will "make it substantially more difficult for groups like the League[ of Women Voters] to register otherwise qualified voters"). It appears that Secretary Kobach came to this meeting armed to lobby the President-elect to alter federal election law and restrict the right to vote.

On May 11, 2017, President Trump issued Executive Order No. 13,799, establishing the Pence-Kobach Commission. The Executive Order provided that the Commission would be chaired by the Vice President and composed of not more than fifteen additional members selected by the President. Exec. Order No. 13,799, § 2. President Trump also named Kansas Secretary of State Kris Kobach as Vice Chair of the Commission. <sup>15</sup>

According to the Executive Order, the "mission" of the Pence-Kobach Commission is to "study the registration and voting processes used in Federal elections." Exec. Order No. 13,799, § 3. The Commission is to "submit a report to the President that identifies . . . those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections; . . . those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections; and . . . those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting." *Id*.

<sup>&</sup>lt;sup>15</sup> Press Release, Office of the Press Secretary, President Announces Formation of Bipartisan Presidential Commission on Election Integrity (May 11, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/05/11/president-announces-formation-bipartisan-presidential-commission.

The office location and address of the Pence-Kobach Commission have not been made public. As required under FACA, the Pence-Kobach Commission has a "Designated Federal Officer," who is an Associate Counsel in the Office of the Vice President, which is an office within the Executive Office of the President. But the offices of the Office of the Vice President are primarily located within the Eisenhower Executive Office Building ("EEOB"), which is part of the White House Complex, and is not generally open to members of the public at large. In order to enter the EEOB, a visitor must have a set meeting with a particular person in the building, who must enter the full name, Social Security Number, date of birth, citizenship status, country of birth, gender, and city and state of residence of each visitor into the White House Worker and Visitor Entry System ("WAVES"), maintained by the United States Secret Service, for review and approval prior to entry. <sup>16</sup>

## III. The Pence-Kobach Commission's Failure to Comply with FACA

On June 28, 2017, Vice President Pence, as chair of the Pence-Kobach Commission, held a telephonic meeting with the members of the Commission.<sup>17</sup> This meeting was not noticed in the Federal Register nor was it held open to the public. According to after-the-fact media interviews with Commission members, this meeting was not merely preparatory or organizational, but touched upon issues of substance, including the potential number of double registrants, and how to identify them.<sup>18</sup> Vice

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<sup>&</sup>lt;sup>16</sup> See Decl. of Donald E. White, Deputy Ass't Dir., U.S. Secret Serv. ¶¶ 4, 7-8, Judicial Watch, Inc., v. U.S. Secret Serv., No. 09-cv-2312 (D.D.C. Apr. 21, 2010), ECF No. 14-2.

<sup>&</sup>lt;sup>17</sup> See Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017), available at https://www.whitehouse.gov/the-press-office/2017/06/28/readout-vice-presidents-call-presidential-advisory-commission-election [hereinafter Pence Release].

<sup>&</sup>lt;sup>18</sup> See Katz, Trump Election Integrity Commission Member: 'We Should Have Predicted' the Backlash, supra note 7.

Chair Kobach told the members of the Commission that he intended to send a letter "to the 50 states and District of Columbia on behalf of the Commission requesting publicly-available data from state voter rolls and feedback on how to improve election integrity." The Commission then reportedly deliberated and concluded that they did not need to review the language of the letters to the states because only Vice Chair Kobach would sign them. During this discussion at the meeting, Commission member Matthew Dunlap, the Secretary State of Maine, advised the Commission, "to be careful how you go at this because election officials are very sensitive guardians of this information, so you want to make sure you're asking for it, not demanding it, and that it really should only cover the information that is publicly available in your state."

Subsequently, on June 28, 2017, Vice Chair Kobach sent a letter to the Secretary of State of each of the fifty states and to the equivalent official of the District of Columbia, requesting submission via e-mail or FTP site by July 14, 2017, of the state's voter roll data, including "the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information

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<sup>&</sup>lt;sup>19</sup> Pence Release.

<sup>&</sup>lt;sup>20</sup> See Levine, Trump Voter Fraud Commission Was Cautioned About Seeking Sensitive Voter Information, supra note 7; Tal Kopan, Pence-Kobach Voting Commission Alarms States with Info Request, Cnn (July 1, 2017), http://www.cnn.com/2017/06/30/politics/kris-kobach-voter-commission-rolls/index.html (citing statements from Commission member, Secretary Dunlap of Maine, and spokesperson for Vice President Pence, Marc Lotter).

<sup>&</sup>lt;sup>21</sup> See Levine, Trump Voter Fraud Commission Was Cautioned About Seeking Sensitive Voter Information, supra note 7.

regarding military status, and overseas citizen information."<sup>22</sup>

The information requested by Vice Chair Kobach and the manner in which it has been sought are clearly of interest and concern to the public. Officials in 48 states refused to comply with the request or have agreed to provide publicly-available data only. <sup>23</sup> Cybersecurity experts, moreover, have described the Commission's plans to aggregate this data as a "gold mine" for hackers. <sup>24</sup> Michael Chertoff, the former Secretary of Homeland Security under President George W. Bush, has published a column titled "Trump's Voter Data Request Poses an Unnoticed Danger," noting that "whatever the political, legal and constitutional issues raised by this data request, one issue has barely been part of the public discussion: national security." <sup>25</sup> There has been no public explanation as to how this data will be maintained in a secure fashion, other than conclusory assertions that it will be.

Media reports indicate that the Pence-Kobach Commission, whether at the June 28 meeting, or at some other time, has already formulated plans for the voter data that it is collecting pursuant to Vice Chair Kobach's letters. According to Marc Lotter, spokesperson for Vice President Pence, the Commission intends to check the information

<sup>&</sup>lt;sup>22</sup> See, e.g., Letter from Kris Kobach to Elaine Marshall, North Carolina Secretary of State (June 28, 2017), available at https://assets.documentcloud.org/documents/3881856/Correspondence-PEIC-Letter-to-North-Carolina.pdf; see also Pence Release; Brandon Carter, *Trump Election Panel Asks All 50 States for Voter Roll Data*, The Hill (June 29, 2017), http://thehill.com/homenews/administration/340117-trump-election-integrity-commission-requests-years-of-voter-data-from.

<sup>&</sup>lt;sup>23</sup> Ari Berman, *Suppression Plans are Backfiring Badly*, The Nation (July 5, 2017), https://www.thenation.com/article/the-trump-administrations-voter-suppression-plans-are-backfiring-badly/

<sup>&</sup>lt;sup>24</sup> Eric Geller & Corey Bennett, *Trump Voter-Fraud Panel's Data Request a Gold Mine for Hackers, Experts Warn*, Politico (July 1, 2017), http://www.politico.com/story/2017/07/01/trump-voter-fraud-panel-hackers-240168.

<sup>&</sup>lt;sup>25</sup> Michael Chertoff, *Trump's Voter Data Request Poses an Unnoticed Danger*, Wash. Post (July 5, 2017), https://www.washingtonpost.com/opinions/trumps-voter-data-request-poses-an-unnoticed-danger-to-nat ional-security/2017/07/05/470efce0-60c9-11e7-8adc-fea80e32bf47\_story.html?utm\_term=.47ed19183852.

<sup>&</sup>lt;sup>26</sup> Jessica Huseman, *Election Experts See Flaws in Trump Voter Commission's Plan to Smoke Out Fraud*, ProPublica (July 6, 2017), https://www.propublica.org/article/election-experts-see-flaws-trump-voter-commissions-plan-to-smoke-out-fraud.

contained in state voter rolls against data housed in various federal databases to identify supposedly ineligible registrants. Mr. Lotter would not specify which federal databases the Pence-Kobach Commission intended to use, but public reports from June 27, 2017 indicated that the Commission intends to compare state voter roll data against the federal database of non-citizens.<sup>27</sup> These plans—which have not been made fully public—are also of immense public concern. Election administration experts have stated that running such a comparison is certain to lead to numerous false positives due to minor inaccuracies on the voter rolls, inconsistencies in data collection and formatting, and the reality of common names and birthdays.<sup>28</sup> Indeed, Secretary Kobach currently operates a highly inaccurate "Interstate Crosscheck" system, which purports to compare voter registration files in multiple states to search for double voters. A team of researchers from Stanford, Harvard, and Microsoft concluded that, if the Crosscheck system were used for voter list maintenance in one state (Iowa), 99.5% of the purported matches would be false positives, such that "200 legitimate voters may be impeded from voting for every double vote stopped."<sup>29</sup>

On July 5, 2017, a planned July 19, 2017 meeting of the Pence-Kobach Commission was noticed in the Federal Register, 14 days prior to the scheduled meeting. The Presidential Commission on Election Integrity (PCEI); Upcoming Public Advisory Meeting, 82 Fed. Reg. 31063-01 (July 5, 2017). The notice stated that the meeting would be held in the EEOB and would be available to the public only through an internet

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<sup>&</sup>lt;sup>27</sup> *Id*.

<sup>&</sup>lt;sup>28</sup> See id.; Maggie Koerth-Baker, *Trump's Voter Fraud Commission is Facing a Tough Data Challenge*, FiveThirtyEight (July 7, 2017), https://fivethirtyeight.com/features/trumps-voter-fraud-commission-isfacing-a-tough-data-challenge/.

<sup>&</sup>lt;sup>29</sup> Sharad Goel, et al., One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections, Jan. 13, 2017, available at https://5harad.com/papers/1p1v.pdf.

livestream. Id.

Also on July 5, 2017, the ACLU requested that the Pence-Kobach Commission produce or make available for public inspection and copying all materials "which were made available to or prepared for or by" the Commission. As of the date the Complaint in this case was filed, the ACLU has not received a response to this request.

#### Standard of Review

Preliminary relief is warranted where the party seeking relief makes a "clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of equities in its favors, and accord with the public interest." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (internal quotation marks and citation omitted); *see also Council on Am.-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 74 (D.D.C. 2009). "The standard for a temporary restraining order is the same as that for preliminary injunction." *Singh v. Carter*, 168 F. Supp. 3d 216, 223 (D.D.C. 2016).

### **ARGUMENT**

## I. The ACLU Has a Substantial Probability of Success on the Merits.

To advance its public scrutiny and accountability goals, FACA sets forth requirements for the composition, operation, and meetings of advisory committees designed to guarantee transparency and disclosure. As relevant to this motion, FACA mandates that "[e]ach advisory committee shall be open to the public" and notice of each meeting "shall be published in the Federal register." 5 U.S.C. app. 2 § 10(a)(1)-(2). In addition, the statute requires that "[i]nterested persons shall be permitted to attend, appear before, or file statements with any advisory committee," subject only to "reasonable" regulations issued by the Administrator of General Services. *Id.* § 10(a)(3). FACA also

mandates that, subject to the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports." 5 U.S.C. app. 2 § 10(b). These requirements, each using the word "shall" to specify a mandatory duty, are "equivalent to a positive command" and are thus nondiscretionary. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 42-43 (D.D.C. 2002) ("by virtue of the use of the word shall, Congress has made [the duty] nondiscretionary"); *see also Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218-219 (1930) (ministerial or nondiscretionary duties are those "so plainly prescribed as to be free from doubt and equivalent to a positive command").

FACA applies to "any committee, board, commission, council, conference, panel, take force, or similar other group, or any subcommittee or other subgroup thereof . . . established or utilized by the President . . . in the interest of obtaining advice or recommendations for the President," denominating such groups as "advisory committees." 5 U.S.C. app. 2 § 3(2). As a commission established by President Trump to "study the registration and voting processes used in Federal elections" and submit a report on this topic to the President, thus providing "advice or recommendations" to the President, the Pence-Kobach Commission is an advisory committee subject to the requirements of FACA. *Id.*; *see Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d at 1073 n.1; *see also* 82 Fed. Reg. 31,063, https://www.federalregister.gov/documents/2017/07/05/2017-14210/the-presiden

that Pence-Kobach Commission was "established in accordance with [FACA]"). Nevertheless, the Vice President and the Pence-Kobach Commission are not complying with non-discretionary requirements of FACA designed to ensure transparency and allow members of the public to scrutinize the activities of the Commission; indeed, as noted, *supra*, they have expressly asserted that they do not acknowledge that FACA's requirements apply to the Commission. Where, as here, federal officials fail to perform ministerial or nondiscretionary duties, district courts are authorized to issue relief in the nature of mandamus compelling them to do so. 28 U.S.C. § 1361.

Three FACA violations are addressed on this motion. *First*, the Vice President and the Pence-Kobach Commission held a telephonic meeting on June 28, 2017 without the requisite notice and public access in violation of the non-discretionary openness requirements of § 10(a)(1)-(3) of FACA. According to subsequent statements by Commission members reported by the media, during this meeting, the Commission discussed substantive issues including potential double registrants and how to identify them, and deliberated over the sending of a letter request for information to all 50 States, the way that the letter should be drafted, and whether the letter should come solely from Vice Chair Kobach or from the Commission as a whole. Decisions have apparently already been made about how the data will be collected, aggregated, stored, and used. Far from being merely preparatory or organizational, this was a substantive meeting of the Commission, triggering FACA's transparency requirements under § 10(a). Indeed, other substantive issues may have been discussed as well during this 90-minute meeting—such as the Commission's already-formulated plans for the voter data that it is

collecting<sup>30</sup>—but there is no way for the public to know, precisely because the meeting did not conform to the openness requirements of the statute.

Nevertheless, Defendants did not notice this meeting in the Federal Register as mandated by § 10(a)(2) of FACA. 5 U.S.C. app. 2 § 10(a)(2) (notice of each advisory committee meeting "shall be published in the Federal register"). Nor was the meeting "open to the public" or "[i]nterested persons . . . permitted to attend, appear before, or file statements" for this meeting as is required by § 10(a)(1) and (3) of FACA. *Id.* §§ 10(a)(1), (3); *see also* 41 C.F.R. § 102-3.140(e) (requiring that advisory committee meetings "conducted in whole or part by a teleconference, videoconference, the Internet, or other electronic medium" must still "meet[] the requirements of this subpart," which include being "held at a reasonable time and in a manner or place reasonably accessible to the public" and permitting "members of the public . . . to file a written statement with the advisory committee").

Second, although the Commission has provided notice of its next meeting—which will take place in-person on July 19—the current plans for that meeting indicate that it will similarly violate the non-discretionary open meeting requirements of § 10(a)(1) and (3) of FACA. Advisory committees must be "open to the public", 5 U.S.C. app. 2 § 10(a)(1), and the chair of a presidential advisory committee "must ensure," among other things, that each "meeting is held . . . in a manner or place reasonably accessible to the public" and that the "meeting room or other forum selected is sufficient to accommodate advisory committee members, advisory committee or agency staff, and a reasonable number of interested members of the public," 41 C.F.R. § 102-3.140(a)-(b).

<sup>&</sup>lt;sup>30</sup> See Huseman, Election Experts See Flaws in Trump Voter Commission's Plan to Smoke Out Fraud, supra\_note 26.

The EEOB is not "reasonably accessible to the public," and the Commission, by intending to allow the public to view the meeting only through an internet livestream, also fails to offer a meeting room or forum "sufficient to accommodate . . . a reasonable number of interested members of the public." *Id*.

Third, compounding the lack of transparency in failing to comply with the nondiscretionary openness requirements applicable to meetings, Defendants have failed to make available all "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Pence-Kobach Commission since its inception, to the public for "inspection and copying at a single location" within the office of the Commission, as is required by § 10(b) of FACA. See Ctr. for Biological Diversity v. Tidwell, No. 15-cv-2176 (CKK), 2017 WL 943902, at \*9 (D.D.C. Mar. 9, 2017) ("The government is required to make section 10(b) materials available to the public as a matter of course, unless a FOIA exception applies."). These include not only minutes, agendas, transcripts, and other documentary materials made available to or prepared for or by the Commission for the June 28 meeting, but also the agenda and all documents made available to or prepared for or by the Pence-Kobach Commission members in advance of the July 19, 2017. Indeed, Defendants have even failed to make public the location of the office of the Pence-Kobach Commission. Insofar as the materials subject to disclosure are kept at the location of the Designated Federal Officer and the listed location of the next Commission meeting—i.e., in the EEOB which houses the Office of the Vice President that office is essentially closed to public access. 31 Other Presidential advisory

<sup>&</sup>lt;sup>31</sup> See Decl. of Donald E. White, Deputy Ass't Dir., U.S. Secret Serv. ¶¶ 4, 7-8, Judicial Watch, Inc., v. U.S. Secret Serv., No. 09-cv-2312 (D.D.C. Apr. 21, 2010), ECF No. 14-2.

committees have, for example, kept documents in offices at the Health and Human Services Agency buildings, which have fewer public access restrictions.<sup>32</sup> In failing to provide a publically accessible location for the public to inspect and copy the Commission's records, the Vice President and the Pence-Kobach Commission do not meet the non-discretionary openness requirements of § 10(b) of FACA.

### II. The ACLU Will Suffer Irreparable Harm Absent Preliminary Relief.

The ACLU, its members, and other members of the public will be irreparably harmed without a temporary restraining order and/or preliminary injunction. The Pence-Kobach Commission is collecting and aggregating an unprecedented amount of data on every voter in the United States, without providing any information to assure voters that their privacy will be maintained. The Commission is also poised to make findings and recommendations that touch upon the fundamental right to vote. The Commission's discussions and decisions are thus of considerable public importance and concern—a fact reflected in the intense media attention and public backlash to the Commission's request for voter information.<sup>33</sup>

And yet, as discussed above, the Commission has already deliberated and made a

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<sup>&</sup>lt;sup>32</sup> For example, the President's Advisory Council on Faith-based and Neighborhood Partnerships stored its documents in the headquarters for the Department of Health and Human Services, which is not part of the White House Complex and not subject to the same security restrictions as buildings that are part of the Complex. *See* President's Advisory Council on Faith-based and Neighborhood Partnerships, FACA Database, http://www.facadatabase.gov/committee/committee.aspx?cid=2222&aid=76 (last visited July 9, 2017) (advisory committee based out of Department of Health and Human Services); Health & Human Services, Contact Us, https://www.hhs.gov/about/contact-us/index.html (offices located at Hubert H. Humphrey Building, 200 Independence Avenue); Decl. of Donald E. White, Deputy Ass't Dir., U.S. Secret Serv. ¶¶ 4, 7-8, Judicial Watch, Inc., v. U.S. Secret Serv., No. 09-cv-2312 (D.D.C. Apr. 21, 2010), ECF No. 14-2 (Hubert H. Humphrey Building not part of White House Complex).

<sup>&</sup>lt;sup>33</sup> Editorial Board, *Happy Fourth of July! Show Us Your Papers*, N.Y. Times (July 3, 2017), https://www.nytimes.com/2017/07/03/opinion/voter-fraud-data-kris-kobach.html; Editorial Board, *Trump Launches His Opening Voter Suppression Salvo*, Wash. Post (July 2, 2017), https://www.washingtonpost.com/opinions/trump-launches-his-opening-voter-suppression-salvo/2017/07/02/a525561a-5dd3-11e7-9b7d-14576dc0f39d\_story.html?utm\_term=.7d1cc26d04b6; Berman, *Suppression Plans are Backfiring Badly, supra* note 23.

number of substantive decisions—all prior to the first meeting that will be "open"—if only via internet—to the public. Indeed, under these circumstances, it is impossible to know the full extent of the Commission's substantive activities to date. Absent relief, there is nothing to prevent the Commission from continuing to conduct its substantive business without public access, under the guise of so-called "organizational" meetings.

Indeed, even the minimal "access" that has been granted for the next Commission meeting is inadequate. Unless the Commission is ordered to move its meeting to another location, the ACLU, its members, and other members of the public will, absent the ACLU's requested relief, "permanently los[e]" their right to attend the in-person July 19 meeting in a "place reasonably accessible to the public" and in a "meeting room or other forum . . . sufficient to accommodate advisory committee members, advisory committee or agency staff, and a reasonable number of interested members of the public." 41 C.F.R. § 102-3.140(a)-(b).

And, with that meeting fast-approaching, the ACLU, its members, and other members of the public will lose any meaningful opportunity for public oversight or comment unless relief is ordered ensuring timely access to the minutes, transcript and any other documents related to the June 28 meeting in order to properly evaluate and understand what the Commission has already discussed, decided and reviewed. *See Food Chem. News*, 980 F.2d at 1472 ("interested parties" must have timely "access to relevant materials" in order "to present their views" and "be informed with respect to the subject matter" at the meeting "at which the materials are used and discussed"). The public, moreover, must have access to all materials from the June 28 meeting and all those associated with the upcoming July 19 meeting *before* that meeting takes place, in order to

be in a position to submit informed written comments that could be considered during the meeting. Retrospective relief will be inadequate; absent the requested relief, the rights of the ACLU, its members, and other members of the public to effectively monitor and hold accountable the Commission in real-time as it develops recommendations and policies at the upcoming July 19 meeting will be "permanently lost." *Gates v. Schlesinger*, 366 F. Supp. 797, 800-01 (D.D.C. 1973). "Because FACA's dictates emphasize the importance of openness and debate, the timing of such observation and comment is crucial to compliance with the statute. Public observation and comment must be contemporaneous to the advisory committee process itself. If public commentary is limited to retrospective scrutiny, the Act is rendered meaningless." *See Ala.-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994) (internal citation omitted); *see also Food Chem. News*, 980 F.2d at 1472 (timely release of committee documents important because "[o]pening the meetings to the public would be meaningless if the public could not follow the substance of the discussions").

## III. The Balance of Harm Weighs in Favor of Preliminary Relief.

The balance of equities strongly favors entry of the requested relief. In contrast to the irreparable harm that will be suffered by the ACLU, its members, and other members of the public, absent a temporary restraining order or preliminary injunction, Defendants will suffer no harm if the requested relief is issued. Indeed, the requested injunction simply requires Defendants to obey the law, by making its documents and deliberations publicly-accessible. *See, e.g., Gates*, 366 F. Supp. at 801 (holding that government Defendant suffers no injury "in being obliged to conform to the open meeting requirement imposed by [FACA]").

## IV. Preliminary Relief Will Serve the Public Interest.

The requested relief will further the public interest in two important ways. First, in mandating that the Vice President and Pence-Kobach Commission comply with their non-discretionary transparency and disclosure obligations, the requested relief will serve the strong public interest embodied by FACA, namely in "providing the public its right to know how its government is conducting the public's business." *Pub. Citizen v. Nat'l Econ. Council*, 703 F. Supp. 113, 129 (D.D.C. 1989); *cf. N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("The public interest is served when administrative agencies comply with their [notice and comment] obligations under the APA."); *Cresote Council v. Johnson*, 555 F. Supp. 2d 36, 40 (D.D.C. 2008) (finding that there is a "general public interest in open and accountable agency decision-making").

A temporary restraining order and/or preliminary injunction will also serve the public's interest in the government following the law and preventing a violation of statutory rights. *See Gates*, 366 F. Supp. at 801 (the "public interest will be best served by requiring strict compliance with the letter and spirit of the Federal Advisory Committee Act"); *see also In re Medicare Reimbursement Litig.*, 309 F. Supp. 2d 89, 99 (D.D.C. 2004), *aff'd*, 414 F.3d 7 (D.C. Cir. 2005) (in granting mandamus relief, recognizing "the public's substantial interest in the [Defendant agency] Secretary's following the law").

#### CONCLUSION

For the foregoing reasons, the ACLU respectfully requests that the Court grant a temporary restraining order and/ or preliminary injunction to compel Defendants, in advance of the July 19 meeting, to: (1) ensure that any telephonic meetings held by the Commission comply with the notice and public access requirements of FACA; (2) make

available for public inspection and copying at a single, publically accessible location all minutes, agendas, reports, studies and documentary material made available to and/or prepared for or by Commission members; and (3) provide physical access to the July 19 meeting by moving it, with public notice, to a publically-accessible location. If Defendants cannot comply with the requirements of FACA prior to the July 19 meeting, the ACLU requests that any meetings of the Pence-Kobach Commission be enjoined until such compliance with these non-discretionary openness requirements is achieved.

Respectfully submitted,

/s/ Dale E. Ho

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Dated: July 10, 2017

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al.	)
Plaintiffs,	)
v.	) No.
DONALD TRUMP, et al.	)
Defendants.	) ) )

## CERTIFICATE OF COUNSEL PURSUANT TO LOCAL CIVIL RULE 65.1(a)

I, Dale E. Ho, one of the attorneys for Plaintiffs in the above captioned case pursuant to Local Civil Rule 65.1(a), certify that on this date at approximately 11:30 a.m. copies of the Complaint and Plaintiffs' Application for a Temporary Restraining Order and/or Preliminary Injunction were e-mailed to Marcia Berman and Elizabeth Shapiro at the United States Department of Justice. Counsel for Plaintiffs spoke with Ms. Berman at approximately 11:00 a.m. on this date, and she confirmed that Plaintiffs could provide advance notice via submission through e-mail to her and Ms. Shapiro.

Respectfully submitted,

/s/ Dale E. Ho

Dale E. Ho (D.C. Bar No. NY0142) American Civil Liberties Union Foundation, Inc. 125 Broad Street, 18th Floor New York, NY 10004

Tel.: 212.549.2686 dho@aclu.org

Dated: July 10, 2017

### **CERTIFICATE OF SERVICE**

I, Dale E. Ho, hereby certify that on July 10, 2017, I will cause one copy of the foregoing Motion for Temporary Restraining Order and/or Preliminary Injunction, including the Memorandum in support and associated attachments to be served on each of the following via inperson service:

United States Attorney for the District of Columbia Judiciary Center Building 555 Fourth Street, N.W. Washington, D.C. 20530

Attorney General of the United States U.S. Department of Justice 950 Pennsylvania Ave., N.W. Washington, D.C. 20530

Presidential Advisory Committee on Election Integrity Eisenhower Executive Office Building 1650 Pennsylvania Ave. N.W. Washington, D.C. 20502

Donald Trump 1600 Pennsylvania Avenue N.W. Washington, D.C. 20500

Michael Pence 1 Observatory Circle N.W. Washington, D.C. 20008

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER

Plaintiff,

V.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; KRIS KOBACH, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES; OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES; GENERAL SERVICES ADMINISTRATION

Defendants.

Civ. Action No. 17-1320 (CKK)

## REPLY IN SUPPORT OF PLAINTIFF'S EMEREGNCY MOTION FOR A TEMPORARY RESTRAINING ORDER

The Court should grant Plaintiff's motion for a Temporary Restraining Order because the Commission seeks to obtain sensitive personal data from state election officials that may not be lawfully disclosed and because the Commission has failed to establish necessary privacy safeguards for the collection of personal information.

Notwithstanding the Commission's claims to the contrary, EPIC has established standing on multiple grounds. First, the Commission seeks all of the records of registered voters in the United States and EPIC is an organization, based in the United States, comprised of registered voters. That alone is sufficient to establish standing. Second, EPIC has obtained affidavits from individual members that make clear that specific members of EPIC are subject to the actions of

the Commission. Third, as an organization established in 1994 to "focus public attention on emerging privacy issues," there is hardly an issue of greater concern to EPIC, as an organization, than a proposal to build a database, maintained in the White House, of the nation's registered voters.

EPIC has also satisfied the requirements for the emergency relief sought. The Commission has asked state election officials to transfer massive amounts of sensitive personal data, protected by state privacy law, to an insecure website without authentication. EPIC's computer science expert confirms that popular web browsers warn users that their information may be stolen ("for example, passwords, messages or credit cards") and that the website "could put your confidential information at risk." It is difficult to construct an example of "irreparable harm" that is more self-evident.

EPIC has multiple ways in which it will prevail on the merits. Even though the

Commission now seeks to hide its FACA obligations from the Court, the Commission's Charter
and case law makes clear that that the Commission is subject to FACA and is an agency for
purposes of the E-Government Act. And there is no effort by the Commission to deny that it
failed to complete a Privacy Impact Assessment or to post a FACA notice, as EPIC alleged.

Further, EPIC's claims for a violation of the constitutional right to information privacy are
particularly strong in this case. The Commission has sought to compel the release of sensitive
personal information, at the heart of democratic institutions and protected under state law. The

Commission has proposed an insecure website to gather personal data and has denied any
obligations to safeguard the data it seeks, notably disclaiming the need to conduct a Privacy
Impact Assessment or to comply with the Privacy Act. The Commission has even attempted to
put itself beyond the reach of the FACA and the APA. These are the circumstances, anticipated

by the Supreme Court in *Whalen v. Roe* and *NASA v. Nelson*, where a constitutional privacy claim would be paramount.

The public interest analysis also favors EPIC because the Commission is only authorized to "study" issues concerning election integrity. There is nothing in the Executive Order or the Commission's Charter that provides authority to gather hundreds of millions of voter records from the states or to create a secret database stored in the White House. The Commission's actions, apart from its stated role, far exceed a solely "advisory" function. As evidenced by the response of state officials of both political parties to the Commission's June 28, 2017 letter, the Commission's request has in fact undermined "the American's people's confidence in the integrity of the voting processes used in federal elections." Executive Order No. 13,799, 82 Fed. Reg. 22,389, 22,389 (May 11, 2017). By the terms of the Commission's purpose and the actions undertaken by the Commission, the order EPIC seeks should be granted.

Finally, the Commission ties itself in knots when it represents to the Court that the information sought is "publicly available" (and therefore no privacy interest attaches) while simultaneously providing assurances for the Court that privacy will be protected. In a declaration for the Court, the Commission Vice Chair states, (1) that the transmission methods for the voter data is "tested and reliable," (2) that the "Commission intends to deidentify any such data prior to any public release of documents," and (3) that "the voter rolls themselves will not be released to the public by the Commission." If the data is "publicly available," why is the Commission seeking to assure the Court that privacy protections will be established?

The Commission has conceded the obvious: the privacy implications of this unprecedented demand for voter roll data from across the country are staggering. This Court

should do no less. An order should issue enjoining the Commission from obtaining the personal information of registered voters.

#### **ARGUMENT**

In its opposition to EPIC's motion for a TRO, the Commission takes the extraordinary position that it can create a database, stored in the White House, containing sensitive personal data about every registered voter in the United States without complying with any of the laws enacted to protect personal privacy. The Commission cites decisions rejecting injunctions in circumstances that bear no resemblance to this case. The Commission does not cite a single example of a government entity that was permitted to collect and aggregate sensitive personal information without first conducting a privacy impact assessment as required under the E-Government Act. There is no such example, because government agencies are not above the law. State officials, unlike the Commission, understand the inherently sensitive nature of voter roll data, which is why many have opposed the Commission's unlawful demand. This Court should grant EPIC's emergency motion for a temporary restraining order and prohibit the collection of personal voter data pending resolution of a preliminary injunction.

This Court has held that plaintiff's are entitled to preliminary injunctive relief where, as here, they "have shown a clear likelihood of success on the merits and have satisfied the other requirements for a preliminary injunction." *Dimondstein v. American Postal Workers Union*, 964 F.Supp.2d 37, 41 (D.D.C. 2013). The merits of EPIC's claim are clear and simple: the Commission violated federal law when it initiated collection of personal voter data without first conducting a PIA as required under the E-Government Act and posting a FACA notice. The Commission's excessive and unprecedented collection of personal data without adequate privacy

<sup>&</sup>lt;sup>1</sup> As this Court noted in *Dimondstein*, the injunction factors have traditionally been evaluated on a "sliding scale" in this Circuit. 964 F. Supp. 2d at 41.

safeguards would violate voters' constitutional right to informational privacy, which the Supreme Court recently acknowledged in *NASA v. Nelson*, 562 U.S. 134 (2011).

EPIC has also satisfied the other requirements for injunctive relief because EPIC has shown that the Commission's unlawful collection of personal voter data would cause an immediate and irreparable injury to EPIC and EPIC's members, and because the balance of the equities and the public interest favor injunctive relief. This Court has made clear that issuance of a TRO is appropriate, as in this case, in order "to preserve the status quo and to prevent irreparable harm." *CAIR v. Gaubatz*, 667 F. Supp. 2d 67, 79 (D.D.C. 2010).

- I. The Commission has not shown that the unprecedented collection of personal voter data would be consistent with the Constitution or with federal law.
  - A. The Commission has failed to show that it does not fit within the clear statutory definition of "agency" and has conceded that PIA's are required under federal law.

The Commission claims that it is not subject to either the APA or the E-Government Act, but these arguments are contrary to the plain text of the statutes and not supported by any of the cases cited in the opposition. *See* Mem. Op. 9-13. The Commission fits squarely within the broad statutory definition of an "agency" in both the APA and the E-Government Act. *See Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (establishing the "substantial independent authority" test and finding that the Office of Science and Technology was an "agency" for the purposes of the APA); *McKinney v. Caldera*, 141 F. Supp. 2d 25, 31–34 (D.D.C. 2001) (reviewing cases applying the APA agency definition). The Commission does not dispute that if the APA and E-Government Act apply, the failure to conduct a PIA violates federal law. EPIC has therefore established a clear likelihood of success on the merits, which justifies entry of a TRO.

The Commission acknowledges at the outset the definition of "agency" in the APA is broad. Mem. Op. 10 ("The APA defines 'agency' as 'each authority of the Government of the United States,' subject to several limitations not applicable here."). But rather than accept the plain text, the Commission attempts to rely on cases that have provided narrow exemptions for (1) the President specifically, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), and (2) certain close advisors to the President, *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993); *Armstrong v. Exec. Office of the Pres.*, 90 F.3d 553, 558 (D.C. Cir. 1996); *CREW v. Office of Admin.*, 566 F.3d 219, 223–23 (D.C. Cir. 2009). These cases are inapposite and do not apply to an entity such as the Commission.

Here, as in *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, the Commission satisfies the definition of "agency" because it (1) investigates, (2) evaluates, and (3) makes recommendations. 917 F.2d 581, 585 (D.C. Cir. 1990) (citing *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971)) ("The Board of course performs precisely these functions. It investigates, evaluates and recommends[.]"); *see* Kobach Decl. 1, 3 (Commission is charged with "studying registration and voting processes"); Kobach Decl. 1 (Commission's report is to identify "which laws, rules, policies, activities, strategies, and practices that enhance or undermine Americans' confidence in the integrity of the federal election process"). Of course the Commission does a great deal more than that, too. It has announced plans to collect, store, and publish the personal data of every registered voter in the country. Kobach Letter 1–2. The Commission cannot credibly characterize this behavior as incidental to its advisory role: it is acting with the force and effect of an agency.

Eight days ago, the Commission undertook to assemble a database of personal voter information covering at least 157 million registered voters across 50 states and the District of

Columbia. Letter from Kris Kobach, Vice Chair, PACEI, to Elaine Marshall, Secretary of State, North Carolina (June 28, 2017), Pl. Mot. TRO Ex. 3; U.S. Census Bureau, Voting and Registration in the Election of November 2016 at tbl. 4a (May 2017). This sweeping depository of personal data would put the Internal Revenue Service—with its yearly haul of just 149 million individual returns—to shame. *SOI Tax Stats - Tax Stats at a Glance*, IRS (2016). The Commission launched this remarkable data collection program with no apparent direction from the President, other than an instruction two months earlier to "study the registration and voting processes used in Federal elections." Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017).

It is simply not true, let alone "well-established," that a president's "close advisors" are categorically immune from APA review. Def. Opp'n 10 (citing a lone case, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), which says nothing about presidential advisors). The determination of whether an entity within the Executive Office of the President constitutes an agency depends on several factors:

These tests have asked, variously, "whether the entity exercises substantial independent authority," *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996) (internal quotation mark omitted), "whether ... the entity's sole function is to advise and assist the President," *id.* (internal quotation mark omitted), and in an effort to harmonize these tests, "how close operationally the group is to the President," "whether it has a self-contained structure," and "the nature of its delegat[ed]" authority, *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993).

Citizens for Responsibility & Ethics in Washington (CREW) v. Office of Admin., 566 F.3d 219, 222 (D.C. Cir. 2009).

This Commission is doing far more than "advis[ing] and assist[ing];" rather, it is taking substantive steps and exercising "substantial[] independen[ce]" from the President. *Meyer*, 981

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<sup>&</sup>lt;sup>2</sup> https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

<sup>&</sup>lt;sup>3</sup> https://www.irs.gov/uac/soi-tax-stats-tax-stats-at-a-glance.

F.2d at 1293. Restating the word "advisory," as the Commission does, cannot erase this conclusion, because "the record evidence regarding [the Commission]'s actual functions" proves otherwise. *Citizens for Responsibility & Ethics in Washington (CREW) v. Office of Admin.*, 559 F. Supp. 2d 9, 26 (D.D.C. 2008), *aff'd*, 566 F.3d 219. The Commission is creating a new database, demanding and collecting vast sums of personal voter data to place in that database, and threatening to publish that information. Kobach Letter 1–2. This is the work of an agency engaged in substantive activity, not an advisor helping the President choose between difference courses of action. *See Armstrong*, 90 F.3d at 558 (noting that the Office of Science and Technology is an "agency" because "not withstanding its proximity to the President" it exercised certain forms of "independent authority") (quoting *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971)). The Commission is thus an agency under the APA.

Because the Commission is an "agency" under the APA, it necessarily meets the definition under the E-Government Act as well. § 3502(1). As the Commission itself concedes, the definition of "agency" used in the FOIA is broader than that of the APA, Def. Opp'n 10, and the definition of "agency" in the E-Government Act is the same as that of the FOIA. § 3502(1); Def. Opp'n 11. Thus, the E-Government Act's PIA requirement applies with full force to the Commission, as it would to any other similar Commission. For example, prior to collecting personal data by the Commission on Presidential Scholars ("a group of eminent private citizens appointed by the President to select and honor the Presidential Scholars"), a Privacy Impact Assessment was conducted and Privacy Act notices were issued. U.S. Dep't of Education, U.S. Presidential Scholars Privacy Policy and Impact Assessment (2017).<sup>4</sup>

Privacy Impact Assessments are a critical step that all agencies must take prior to initiating collection of personal information. In many cases, these assessments lead to changes in

<sup>&</sup>lt;sup>4</sup> https://www2.ed.gov/programs/psp/applications/privacy.pdf.

or abandonment of the agency programs under review, which are necessary to avoid inherent privacy risks. For example, the Department of Homeland Security cancelled a controversial national license plate tracking program following the initiation of a Privacy Impact Assessment. *See* Dep't of Homeland Sec., DHS-ICE-PIA-039 Acquisition and Use of License Plate Reader Data from a Commercial Service (2015);<sup>5</sup> Ellen Nakashima & Josh Hicks, *Department of Homeland Security Cancels National License-Plate Tracking Plan*, Washington Post (Feb. 19, 2014).<sup>6</sup> Similarly, the TSA was forced by Congress to shutter a controversial passenger screening program after an initial privacy assessment raised significant issues. Ryan Singel, *Congress Puts Brakes on CAPPS II*, Wired (Sept. 26, 2003) ("Congress moved Wednesday to delay the planned takeoff of a controversial new airline passenger-profiling system until an independent study [by the GAO] of its privacy implications and effectiveness at stopping terrorism can be completed.").<sup>7</sup>

The Commission's failure to undertake the Privacy Impact Assessment, required of all federal agencies, places at risk the privacy interests of registered voters across the country.

# B. The Commission ignores the factors in this case that implicate the constitutional right to information privacy.

The Commission asserts that EPIC's claim that a constitutional right to informational privacy fails because "neither the Supreme Court nor the D.C. Circuit has held that a federal right to informational privacy exists." But that is not what the Court has said. In *NASA v. Nelson*, Justice Alito, writing for the Court, said:

<sup>&</sup>lt;sup>5</sup> https://www.dhs.gov/publication/dhs-ice-pia-039-acquisition-and-use-license-plate-reader-data-commercial-service.

<sup>&</sup>lt;sup>6</sup> https://www.washingtonpost.com/world/national-security/dhs-cancels-national-license-plate-tracking-plan/2014/02/19/a4c3ef2e-99b4-11e3-b931-0204122c514b story.html.

<sup>&</sup>lt;sup>7</sup> https://www.wired.com/2003/09/congress-puts-brakes-on-capps-ii/.

<sup>&</sup>lt;sup>8</sup> Even the Commission's analysis of D.C. Circuit law is misleading. In fact, in *Am Fed. Of Gov't Emps.*, *AFL-CIO v. Dep't of House & Urban Dev.* 118 F.3d 786, 791 (D.C Cir. 1997), the Court observed:

As was our approach in *Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance. 429 U.S., at 599, 605. We hold, however, that, whatever the scope of this interest, it does not prevent the Government from asking reasonable questions of the sort included on SF-85 and Form 42 in an employment background investigation that is subject to the Privacy Act's safeguards against public disclosure.

NASA v. Nelson, 562 U.S. 134, 147–48 (2011).

The actual holding in *Nelson* is significant in this matter for several reasons. First, the Court in *NASA v. Nelson* observed that in *Whalen v. Roe*, "the Court pointed out that the New York statute contained 'security provisions' that protected against "[p]ublic disclosure" of patients' information." 562 U.S. at 145. "The [Whalen] Court thus concluded that the statute did not violate 'any right or liberty protected by the Fourteenth Amendment.'" *Id.* (citing *Whalen v.* 

[S]everal of our sister circuits have concluded based on Whalen and Nixon that there is a constitutional right to privacy in the nondisclosure of personal information. See United States v. Westinghouse Electric Corp., 638 F.2d 570, 577-580 (3d Cir. 1980) (holding that there is a constitutional right to privacy of medical records kept by an employer, but that the government's interest in protecting the safety of employees was sufficient to permit their examination); Plante v. Gonzalez, 575 F.2d 1119, 1132, 1134 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979) (identifying a "right to confidentiality" and holding that balancing is necessary to weigh intrusions); Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983), cert. denied, 464 U.S. 1017 (1983) (applying an intermediate standard of review to uphold a financial disclosure requirement). See also. Hawaii Psychiatric Soc'y Dist. Branch v. Ariyoshi, 481 F. Supp. 1028, 1043 (D. Hawaii 1979) (holding that disclosure of psychiatric records implicates the constitutional right to confidentiality); McKenna v. Fargo, 451 F. Supp. 1355, 1381 (D.N.J. 1978) ("The analysis in Whalen ... compels the conclusion that the defendant ... must justify the burden imposed on the constitutional right of privacy by the required psychological evaluations.").

118 F.3d at 792.

The court in AFGE concluded:

Having noted that numerous uncertainties attend this issue, we decline to enter the fray by concluding that there is no such constitutional right because in this case that conclusion is unnecessary. Even assuming the right exists, the government has not violated it on the facts of this case. Whatever the precise contours of the supposed right, both agencies have presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into their employees' privacy.

AFGE v. HUD, 326 U.S. App. D.C. 185, 118 F.3d 786, 793 (1997). In this matter, the Commission has presented no such "sufficiently weighty interests" to justify the intrusion in the privacy of hundreds of millions of registered voters.

*Roe*, 429 U.S. at 606). Second, the Court in *Nelson* relied on the Privacy Act's safeguards to prohibit public disclosure. Third, the Supreme Court in both *Whalen* and in *Nelson* deemed the request for information to be "reasonable."

Here the sensitive voter data sought from the states, including felony convictions and partial SSNs, is on par with the personal information at issue in *Whalen* and *Nelson*, though whether it is "reasonable" is broadly contested by state election officials across the country. *See, e.g,* Editorial, *Texas and Other States Are Right to Refuse Trump Panel's Request for Private Voter Information*, Dallas Morning News (July 7, 2017) ("Conservatives and liberals alike should be appalled that a commission brought into existence by a presidential executive order wants such sensitive personal data on the thinnest of pretexts."). It bears emphasizing that this opposition to the Commission's is from a bipartisan group of public officials most expert in the data sought and the laws that apply.

Moreover, contrary to the security methods mandated by the state statute in *Whalen*, the Commission has (1) proposed an unsecure server to receive sensitive data and (2) has disclaimed any responsibility to undertake a Privacy Impact Assessment. Most critically, the Commission has given no indication that its data collection practices are subject to the strictures of the Privacy Act, which was the key reason in *Nelson* that the Court did not reach the informational privacy claim. As Justice Alito explained in the holding for the Court:

In light of the protection provided by the Privacy Act's nondisclosure requirement, and because the challenged portions of the forms consist of reasonable inquiries in an employment background check, we conclude that the Government's inquiries do not violate a constitutional right to informational privacy.

NASA, 562 U.S. at 764–65.

The Commission has presented this Court with informational privacy risks comparable to those that were before the Supreme Court in *Whalen v. Roe* and *NASA v. Nelson*, but with none

of the privacy safeguards or practices that provided the Court with sufficient assurances and little evidence that the request is "reasonable." These are the circumstances where the claim of informational privacy are most compelling. The Supreme Court explained in Whalen that the "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy,' and intimated "a sufficiently grievous threat" may establish a "constitutional violation." *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977). Without a "successful effort to prevent abuse and limit access to the personal information at issue," which the disclosure amounts to to "a deprivation of constitutionally protected privacy interests" requiring the state to prove the measures are "necessary to promote a compelling state interest." *Id.* at 607 (Brennan, W., concurring).

If there were any information worthy of a constitutional shield from disclosure, it is personal information shared for the limited purpose of exercising of the right to vote. The right to vote is referenced by the U.S. Constitution five times, more than any other right. U.S. Const. amends. XIV § 5, XV § 1, XIX, XXIV § 1, XXVI § 1. The right to vote, secured only through robust voter privacy measures, is foundational to American democracy. That the Commission attempts to collect personal *voter* data en masse raises the constitutional stakes. And, without a "successful effort prevent abuse and limit access to" that data—such as the Commission's direction to use an unsecured website for the data transfer—the state must demonstrate to the Court the "necess[ity]" of the collection "to promote a compelling state interest." *Whalen*, 429 U.S. at 607. A proposal to establish a national database of sensitive voter data, gathered contrary to state privacy law, and with no assurance of privacy protection makes clear the right of informational privacy. There is little in the Supreme Court's decisions in *NASA v. Nelson* and *Whalen v. Roe*, or even the D.C. Circuit's *AFGE* opinion, to suggest otherwise.

And regardless of whether the Commission considers itself outside of the FACA or the APA, it is not beyond the reach of the federal Constitution.

# II. The Commissions unlawful and insecure collection of personal voter data would cause an irreparable injury

In response to EPIC's motion, the Commission has submitted irrelevant and self-contradictory statements regarding the irreparable harm posed by the unlawful collection of voter data, and the Commission has failed to address the obvious data security risks created by their actions. EPIC has presented evidence to show that disclosure of personal voter data would create a "great, actual, and imminent" injury, *Dimondstein*, 964 F. Supp. 2d at 49, including sworn statements by privacy and security experts. *See, e.g.*, Pl. Mot. TRO Ex. 6; Second Decl. of Harry Lewis, Ex. 11; EPIC Member Declarations, Exs. 1–9. In contrast, the Commission has submitted a declaration from a named defendant in this case with no stated background in computer science or privacy law, which includes unsupported assertions about the "security" of "file transfer" methods. *See* Decl. of Kris W. Kobach.

Absent the issuance of a TRO in this case, the Commission's actions will cause irreparable harm to EPIC and its members for three independent and distinct reasons, none of which are "speculative." First, the Commission's reliance on insecure data transfer methods poses an obvious threat to the integrity and security of the voter data. Second, the Commission itself has conceded that the personal voter data it is collecting should not be made publicly available. And third, any post-collection remedies available to voters are not adequate to address the misuse and mishandling of their personal data by the Commission.

Vice Chair Kobach concedes in his declaration that he sent "identical letters" to "secretaries of state or chief election officers in each of the fifty states and the District of Columbia," which demanded that those state officials submit personal voter data and stated that

the officials could "submit [their] responses electronically to

ElectionIntegrityStaff@ovp.eop.gov *or by* utilizing the Safe Access File Exchange" system. Kobach Decl., Ex. 3, at 2 (emphasis added). In his declaration, Kobach contradicts his own letter by claiming that he "intended" for the states to use the File Exchange website (rather than an email address) to send personal voter data to the Commission. Kobach Decl. ¶ 5. While Kobach did not offer any explanation for this discrepancy, his statement makes clear he is aware that email is not a secure method to be used for transferring personal voter data. Kobach Decl. ¶ 5. But even if state officials follow the "intent" rather than the text of Kobach's letter, voters personal data will not be secure.

As Harry Lewis, a distinguished professor of computer science at Harvard University, explains, the website referred to in the Commission's letter ("safe.amrdec.army.mil") is "not a secure website for the transfer of personal data." Second Decl. of Harry Lewis ¶ 9. In fact, when Professor Lewis attempted to access the website using common internet browsers, he was directed to clear warnings that the site was not secure. *Id.* ¶ 7–8. In Google Chrome, the warning read "Your connection is not private—Attackers might be trying to steal your information from safe.amrdec.army.mil (for example, passwords, messages, or credit cards)." *Id.* ¶ 7. In Safari, the website returned an error message that stated "Safari can't verify the identity of the website 'safe.amrdec.army.mil.' The certificate for this website is invalid. You might be connecting to a website that is pretending to be 'safe.amrdec.army.mil,' which could put your confidential information at risk." *Id.* ¶ 8.

Even the Commission's own description of the File Exchange website acknowledges that it was not designed to maximize security. Vice Chair Kobach states that the system is used "routinely by the military for large, *unclassified* data sets." Kobach Decl. ¶ 5 (emphasis added).

The Commission has not provided any evidence that the File Exchange system is designed, or even permitted, to be used to transfer sensitive personal information. The Commission also has not established that it has the authority to use the File Exchange system for this purpose, or that it has the authority to use "the White House computer system" to store the personal data of hundreds of millions of voters. Kobach Decl. ¶ 5.

Not only do the Commission's proposed insecure data transfer methods create serious security risks for the sensitive personal voter data that the Commission requested, these methods are incapable of ensuring the *integrity* and accuracy of the data that the Commission receives. The Commission has not provided any evidence that the email address or the File Exchange website are capable of verifying the source and authenticity of the documents and data submitted. Criminals and other unauthorized parties are known to send fake emails "that are made to appear as if they are coming from" government accounts, including accounts within the Pentagon's "Defense Security Service." Jenna McLaughlin, *Pentagon Email Addresses Being Used in Cyber Spoofing Campaign*, Foreign Policy (May 12, 2017). Nothing would stop a malicious actor—perhaps even a foreign government—from submitting fake "voter roll" data to the Commission to degrade the accuracy of the database. These are precisely the types of issues that would have been identified during a Privacy Impact Assessment, but the Commission failed to conduct one prior to initiating this proposed collection.

Even the Commission concedes that the personal voter data it seeks is sensitive and should not be released to the public. Vice Chair Kobach states in his declaration that, contrary to the text of the letter, the personal voter data submitted to the Commission "will not be released to the public." Kobach Decl. ¶ 5. But even this statement is contradicted by the sentence that

 $<sup>^9\</sup> http://foreignpolicy.com/2017/05/12/pentagon-email-addresses-being-used-in-cyber-spoofing-campaign/.$ 

proceeds it: "With respect to voter roll data, the Commission intends to de-identify any such data prior to any public release of documents." Kobach Decl. ¶ 5. It is not clear whether Vice Chair Kobach believes that voter roll data is a "document" subject to his blanket promise of public disclosure. But regardless of Kobach's semantic confusion, it is clear that the Commission will release voter data to the public. The fact that the Commission "intends" to "de-identify" the data is woefully insufficient, especially where there is no evidence that the Commission is capable of deidentifying personal data of hundreds of millions of American voters. The fact that Commission "intends to maintain the data on the White House computer system" does not provide any meaningful assurance of security.

The Commission goes to great lengths to emphasize that it is only seeking "publicly available" information. But in fact the vast majority of personal data sought by the Commission is protected by state voter privacy laws. According to a preliminary survey by EPIC, states could

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<sup>&</sup>lt;sup>10</sup> De-identification is a complex subject of research for computer science experts, and not something that can be implemented by the Commission on a whim. *See generally* Nat'l Inst. of Standards and Tech., NISTIR 8053, *De-Identification of Personal Information* (2015), http://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8053.pdf.

The White House's track record for information security is alarming in its own right. Evan Perez & Shimon Prokupecz, *How the U.S. Thinks Russians Hacked the White House*, CNN (Apr. 8, 2015), http://www.cnn.com/2015/04/07/politics/how-russians-hacked-the-wh/index.htm; Ellen Nakashima, *Hackers Breach Some White House Computers*, Wash. Post (Oct. 28, 2014), https://www.washingtonpost.com/world/national-security/hackers-breach-some-white-house-computers/2014/10/28/2ddf2fa0-5ef7-11e4-91f7-5d89b5e8c251\_story.html; Sean Gallagher, "*Hacked*" *E-Mail Account of White House Worker Exposed in 2013 Password Breach*, Ars Technica (Sept. 23, 2016), https://arstechnica.com/security/2016/09/hacked-e-mail-account-of-white-house-worker-exposed-in-2013-password-breach/; Lily Hay Newman, *That Encrypted Chat App the White House Liked? Full of Holes*, Wired (Mar. 9, 2017), https://www.wired.com/2017/03/confide-security-holes/.

Privacy risks to voters would arise no matter what database the government stored the information

in. See, e.g., Tom Vanden Brook & Michael Winter, Hackers penetrated Pentagon email, USA Today (Aug. 6, 2015), https://www.usatoday.com/story/news/nation/2015/08/06/russia-reportedly-hacks-pentagon-email-system/31228625/; Office of Pers. Mgmt, OPM to Notify Employees of Cybersecurity Incident (June 4, 2015), https://www.opm.gov/news/releases/2015/06/opm-to-notify-employees-of-cybersecurity-incident/; Elise Viebeck, Russians hacked DOD's unclassified networks, The Hill (Apr. 23, 2015), http://thehill.com/policy/cybersecurity/239893-russians-hacked-dods-unclassified-networks; Nicole Perlroth, State Department Targeted by Hackers in 4th Agency Computer Breach, N.Y. Times (Nov. 16 2014); Veterans Affairs Data Theft, EPIC.org (2006), https://epic.org/privacy/vatheft/.

provide the Commission with little more than name and address of registered voters without running afoul of state law.<sup>13</sup> A study by the Brennan Center also finds numerous restrictions on the release of state voter rolls. Brennan Center for Justice, Examples of Legal Risks to Providing Voter Information to Fraud Commission (Jul. 2017).<sup>14</sup>

The Commission contends that it "has only requested data that is already public available," Def. Opp'n 8, and cites to a 2016 report of the National Conference of State Legislatures ("NCSL"). But as the NCSL actually explained, "Generally, all states provide the name and address or the registered voter. From there is gets complicated. At least 25 states limit access to social security numbers, date of birth or other identifying factors such as a drivers license number." *See* National Conference of State Legislatures, States and Election Reform (Feb. 2016). The 2016 NCSL report notes also that "Texas specifically restricts the residential address of any judge in the state" and several states have a general prohibition on "information of a personal nature." *Id.* <sup>16</sup>

The 2016 NCSL report, cited by the Commission, goes on to explain the limitation on access to voter data, use of voter data, and costs for obtaining voter data. The NCSL explains "Beyond candidates and political parties, who can access voter lists varies state by state. Eleven states do not allow members of the public to access voter data." *Id.* at 2. Further, several states

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<sup>&</sup>lt;sup>13</sup> See e.g. Alaska Stat. § 15.07.195 ("The following information set out in state voter registration records is confidential and is not open to public inspection: (1) the voter's age or date of birth; (2) the voter's social security number, or any part of that number; (3) the voter's driver's license number; (4) the voter's voter identification number; (5) the voter's place of birth; (6) the voter's signature."); see also e.g. Ind. Code § 3-7-26.4-8 (2017) ("The election division shall not provide information under this section concerning any of the following information concerning a voter: (1) Date of birth. (2) Gender. (3) Telephone number or electronic mail address. (4) Voting history. (5) A voter identification number or another unique field established to identify a voter. (6) The date of registration of the voter.").

https://www.brennancenter.org/sites/default/files/analysis/Legal\_Implications\_of\_Kobach\_Request.pdf.
 http://www.ncsl.org/Documents/Elections/The Canvass February 2016 66.pdf.

<sup>&</sup>lt;sup>16</sup> see e.g. Kan. Stat. Ann. § 45.221(30) (exempting from the Kansas Open Records Act any "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.").

restrict the use of voter data. Several states limit "the use to just political purposes or election purposes." *Id.* States also typically charge requesters costs for the production of data. According to the NCSL, "the average cost for a voter list is approximately \$1,825."

Even names and address are not always available. The NCSL report notes that "thirtynine states maintain address confidentiality programs designed to keep the addresses of victims of domestic violence or abuse, sexual assault or stalking out of public records for their protection." *Id.* at 2. The NCSL describes additional restrictions on the release on name and address information who are preregistered but are also minors. *Id.* at 2-3.

What then to make of a request from a Commission charged with "promoting election integrity" that asks state election officials to turn over Social Security Numbers, military status, felony convictions records, party affiliation and state voting history? The answer is provided by the response of the state officials who simply refused to release the personal data sought by the Commission.

# III. The balance of the equities and the public interest favor granting EPIC's motion.

The Commission's argument that preserving the status quo by issuing a TRO would be against the public interest is illogical and contrary to well established precedent. The public interest weighs heavily against permitting an unlawful governmental action, because the public interest lies in having government agencies follow the law. *League of Women Voters*, 838 F.3d at 12. The Commission has no legitimate interest in violating the law or individuals' constitutional rights, no matter how important their governmental responsibilities. *See, e.g. Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). While the Commission alleges that collecting personal voter

<sup>&</sup>lt;sup>17</sup> The Commission made no offer in its letter to the states to pay any of the costs associated with the production of the voter roll data. The Commission instructed the state officials to provide the data by email or to an insecure website.

data from the states is a "necessary first step" for its work, it provides no evidence to show that there is urgency to that request. The Executive Order makes clear that the Commission must operate in a way "consistent with applicable law." Exec. Order No. 13,799, § 7(f). Without the PIA as required under the E-Government Act, and in violation of the constitutional right to privacy, the Commission's collection of sensitive voter data is unlawful, and thus contrary to its stated mission.

The Commission is not tasked with enforcing election law nor empowered to investigate specific election-related crimes. The Commission is only authorized to "study" the issues outlined in the Order. Exec. Order No. 13,799, § 3. Therefore, its interest in collecting particular voter information is distinctly attenuated from its purpose, lowering its interests against the restraining order. The Commission has also failed to allege precisely how the collection and aggregation of sensitive voter data is necessary to "study" and "submit a report." Exec. Order No. 13,799, § 3.

Thus, while preventing the collection of sensitive private voter data will prevent a clear violation of federal law and an infringement of the essential constitutional right of informational privacy of voters, halting this unlawful act would not cause any harm to the Commission or the public.

#### IV. EPIC has standing to bring this suit.

Because EPIC has clearly demonstrated an injury in fact both to itself as an organization and to its members, EPIC has Article III standing. The Commission's arguments to the contrary are based on a misreading of the record and a misinterpretation of the law.

EPIC has organizational standing to bring this suit because the Commission's unlawful collection of personal voter data directly impairs EPIC's mission and activities: "protect[ing]

privacy, free expression, [and] democratic values . . . ." *See About EPIC*, EPIC. org (2015). <sup>18</sup> EPIC's mission includes, in particular, the promotion of privacy safeguards for voter data. *See, e.g., Voting Privacy*, EPIC.org (2017); <sup>19</sup> EPIC, Comment Letter on U.S. Election Assistance Commission Proposed Information Collection Activity (Feb. 25, 2005). <sup>20</sup> The Commission's failure to carry out a Privacy Impact Assessment and disregard for the informational privacy rights of U.S. voters have thus injured EPIC by making EPIC's "activities more difficult" and creating a "direct conflict between the [Commission's] conduct and [EPIC's] mission." *Nat'l Treasury Empls. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996).

Like the plaintiffs in *PETA v. USDA*, 797 F.3d 1087 (D.C. Cir. 2015), EPIC has had to expend organizational resources "in response to, and to counteract, the effects of defendants' alleged [unlawful conduct]." *Id.* at 1097. Simply to preserve the status quo—wherein the federal government was *not* illegally aggregating the personal voter data of nearly 200 million Americans—EPIC has been forced to expand its long-running efforts to protect voter privacy. For example, EPIC has had (1) to draft and seek expert sign-ons for a letter urging state election officials to "protect the rights of the voters . . . and to oppose the request from the PACEI," Letter from EPIC et al. to Nat'l Ass'n of State Sec'ys (July 3, 2017);<sup>21</sup> (2) to seek records from the Commission concerning its collection of voter data, Letter from Eleni Kyriakides, EPIC Law Fellow, to the PACEI (July 4, 2017);<sup>22</sup> (3) to develop a webpage with extensive information on the Commission's activities. *Voter Privacy and the PACEI*, EPIC.org (2017);<sup>23</sup> and (4) respond

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<sup>18</sup> https://epic.org/about.

https://epic.org/privacy/voting/.

<sup>&</sup>lt;sup>20</sup> https://epic.org/privacy/voting/register/eac comments 022505.html.

https://epic.org/privacy/voting/pacei/Voter-Privacy-letter-to-NASS-07032017.pdf.

<sup>&</sup>lt;sup>22</sup> https://epic.org/privacy/voting/EPIC-17-07-04-PACEI-20170704-Request.pdf.

<sup>&</sup>lt;sup>23</sup> https://epic.org/privacy/voting/pacei/.

to numerous requests from state election officials, citizen organizations, and news organizations concerned about the impact of the Commission's request for voter data on personal privacy.

The Commission's direct impact on EPIC's mission and work concerning voter privacy is precisely the type of "concrete and demonstrable injury to" EPIC's "organizational activities" that courts have long deemed sufficient for standing. *Havens*, 455 U.S. at 379; *see also PETA*, 797 F.3d 1087 (holding that a non-profit animal protection organization had standing under *Havens* to challenge the USDA's failure to promulgate bird-specific animal welfare regulations); *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006) (finding that a health advocacy organization had organizational standing under *Havens* to challenge an FDA regulation). EPIC has thus adequately demonstrated organizational standing.

Contrary to the Commission's assertions, EPIC has also demonstrated an injury in fact to its members which is traceable to the Commission's conduct. EPIC therefore has associational standing.

First, EPIC can assert associational standing on behalf of numerous EPIC members whose privacy is threatened by the Commission's unlawful collection of personal voter data. Voter Declaration of Kimberly Bryant, Ex. 1; Voter Declaration of Julie E. Cohen, Ex. 2; Voter Declaration of William T. Coleman III, Ex. 3; Declaration of Harry R. Lewis, Ex. 4; Voter Declaration of Pablo Garcia Molina, Ex. 5; Voter Declaration of Peter G. Neumman, Ex. 6; Voter Declaration of Bruce Schneier, Ex. 7; Voter Declaration of James Waldo, Ex. 8; Voter Declaration of Shoshana Zuboff, Ex. 9. As each of the above-named EPIC members has attested: "The disclosure of my personal information—including my name, address, date of birth, political party, social security number, voter history, active/inactive or cancelled status, felony

convictions, other voter registrations, and military status or overseas information—would cause me immediate and irreparable harm." *See* Voter Declarations, Exs. 1–9.

Second, EPIC's members will necessarily suffer injuries in fact if the Commission is allowed to carry out its plans. As EPIC has explained, the unlawful collection and aggregation of state voter data, standing alone, constitutes an injury in fact. Pl. Mem. 17; Council on Am.-Islamic Relations v. Gaubatz, 667 F. Supp. 2d 67, 76 (D.D.C. 2009) (holding that the wrongful disclosure of confidential information is a form of injury); Hosp. Staffing Sols., LLC v. Reyes, 736 F. Supp. 2d 192, 200 (D.D.C. 2010) ("This Court has recognized that the disclosure of confidential information can constitute an irreparable harm because such information, once disclosed, loses its confidential nature."). Though it is unlawful for the Commission to obtain voter data without (1) conducting a PIA and (2) adhering to constitutional strictures on the collection of personal information, that is precisely what the Commission promises to do—and by a date certain (July 14). The injuries to EPIC's members are thus "certainly impending." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 133 (2013). The Government cannot confidently assert that it will do something yet dismiss the inevitable result as pure "speculati[on]." Def. Opp'n 6.

Third, the Commission's characterization of the data it seeks ("publicly available") is meaningless in the Article III standing context. The Commission has no legal authority to collect the personal voter data it has requested. *See* § 3501 note. If it nevertheless collects that data, the Commission has broken the law and caused an injury in fact. *See CAIR*, 667 F. Supp. 2d at 76; *Hosp. Staffing Sols*, 736 F. Supp. 2d at 200. It does not matter that a particular state might disclose its voter data to some *other* requester under some *other* circumstances: *this* requester—the Commission—is barred by law from gathering this data without sufficient constitutional and

statutory privacy safeguards. Nor can the Commission use the existing vulnerability of voter data

at the state level to justify an even greater risk to voter privacy at the federal level. Def. Opp'n 7.

A lesser harm does not excuse a greater one, and it certainly does not erase an injury in fact.

This Court consequently has jurisdiction to decide this case under Article III.

CONCLUSION

Plaintiff has satisfied the necessary elements to obtain the relief sought and has standing

to bring this claim. Plaintiff specifically asks this Court to issue a Temporary Restraining Order

to maintain the status quo so that this Court may have the opportunity to determine whether the

Commission's proposed collection of personal voter data is lawful.

Respectfully Submitted,

/s/ Marc Rotenberg

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Dated: July 6, 2017

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## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER

Plaintiff,

V.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; KRIS KOBACH, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES; OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES; GENERAL SERVICES ADMINISTRATION

Defendants.

No: 1:17-cv-01320-CKK

#### **ADDENDUM**

## PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO THE COURT'S JULY 5, 2017, ORDER

The Commission's response to this Court's Order of July 5, 2017, Dkt. 9, further underscores that EPIC is likely to succeed on the merits of its claims and that EPIC is entitled to a Temporary Restraining Order. *See* Second Declaration of Kris W. Kobach, Dkt. 11-1.

First, as the Defendants concede, Commission member Christy McCormick is also a member of the Election Assistance Commission ("EAC"). Kobach Second Decl. 2. The EAC is an agency under the APA. *Id.* at 2259. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 5 (D.C. Cir. 2016) (citing *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013)) (noting that a plaintiff could "challenge the [Election Assistance] Commission's denial [of the plaintiff's request] under the Administrative Procedure Act

('APA').") By virtue of serving as a Commissioner of an APA-covered agency, Ms. McCormick is subject to the strictures of the APA in all official exercises of her authority—*including* while sitting on a presidential advisory commission. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 39–40 (D.D.C. 2002) (citing *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980)). ("Thus, for the reasons articulated by the D.C. Circuit in *Ryan*, this Court holds that an action that otherwise would qualify for the APA's definition of 'agency action' does not fall outside the coverage of the APA simply because the agency head acts in an advisory capacity to the President.")

It is implausible to claim, as Mr. Kobach does, that the choice of Ms. McCormick to serve on the Commission was unrelated to her membership on the EAC—a "bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration." *About EAC*, U.S. Election Assistance Comm'n (2017). Also, Mr. Kobach does not discount the possibility that additional federal agency officials will be named to the Commission. *See* Kobach Second Decl. 2.

Second, Mr. Kobach's claim that the Commission has "no plans" to "collect or store any voter registration or other elections-related data" using General Services Administration (GSA) facilities does not diminish the GSA's ordained role as the provider of "administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission on a reimbursable basis." 82 Fed. Reg at 22,389; *see also* Def. Opp'n Ex. 2 (GSA "*shall* provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission" (emphasis added)). Because the GSA is *required* to provide such facilities to the Commission, the GSA is accountable as an

<sup>&</sup>lt;sup>1</sup> https://www.eac.gov/about-the-useac/.

agency for the Commission's use and misuse of those facilities. GSA is thus properly named as a Defendant and may be enjoined under the APA.

Finally, Mr. Kobach's representations concerning "Safe Access File Exchange (SAFE)" are alternately misleading or meritless. "SAFE" is not, in fact, a secure system. Second Lewis Decl., Ex. 11. Further, the claim that "States will upload data to the SAFE website" is undermined by Mr. Kobach's letter to state election officials, inviting them to transmit personal voter data via email. Kobach Letter 2. Lastly, Mr. Kobach wrongly represents that the White House is to be "responsible for collecting and storing data for the Commission," when the Executive Order establishing the Commission clearly states that it is the GSA's obligation to provide such services to the Commission. 82 Fed. Reg at 22,389.

## LIST OF EXHIBITS

Exhibit 1	Declaration of Kimberly Bryant, EPIC Member (July 5, 2017)
Exhibit 2	Declaration of Julie E. Cohen, EPIC Member (July 5, 2017)
Exhibit 3	Declaration of William T. Coleman III, EPIC Member (July 5, 2017)
Exhibit 4	Declaration of Harry R. Lewis, EPIC Member (July 5, 2017)
Exhibit 5	Declaration of Pablo Garcia Molina, EPIC Member (July 5, 2017)
Exhibit 6	Declaration of Peter G. Neumann, EPIC Member (July 5, 2017)
Exhibit 7	Declaration of Bruce Schneier, EPIC Member (July 5, 2017)
Exhibit 8	Declaration of James Waldo, EPIC Member (July 5, 2017)
Exhibit 9	Declaration of Shoshana Zuboff, EPIC Member (July 5, 2017)
Exhibit 10	National Conference of State Legislatures, <i>It's a Presidential Election Year: Do You Know Where Your Voter Records Are?</i> (Feb. 2016)
Exhibit 11	Second (Expert) Declaration of Harry R. Lewis (July 5, 2017)

# Exhibit 1

#### **DECLARATION OF NAME**

- I, Kimberly Bryant, declare as follows:
  - 1. My name is Kimberly Bryant. I am over 18 years old. The information in this declaration is based on my personal knowledge.
  - 2. I am a resident San Francisco, CA.
  - 3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
  - 4. EPIC is a non-profit, public interest research center in Washington, DC.
    EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules.
    EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world epic.org.
  - 5. I am currently registered to vote in California.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.

7. The disclosure of my personal information—including my name, address, date of birth, political party, social security number, voter history, active/inactive or cancelled status, felony convictions, other voter registrations, and military status or overseas information—would cause me immediate and irreparable harm.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017

Kimberly Bryant NAME

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER 1718 Connecticut Avenue, N.W. Suite 200 Washington, D.C. 20009

Plaintiff,

V.

Civ. Action No. 17-1320 (CKK)

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his official capacity as Chair of the Presidential Advisory Commission on Election Integrity; KRIS KOBACH, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES; OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES;

The White House 1600 Pennsylvania Avenue, N.W. Washington, D.C. 20500

GENERAL SERVICES ADMINISTRATION 1800 F Street, N.W. Washington, D.C. 20405

UNITED STATES DEPARTMENT OF DEFENSE 1000 Defense Pentagon Washington, D.C. 20301-0001

Defendants.

#### AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–706, the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2, and the United States

Constitution for injunctive and other appropriate relief to halt the collection of state voter data by

the Presidential Advisory Commission on Election Integrity (the "PACEI" or the "Commission"), by officers of the Commission, and by the agencies which oversee and facilitate the activities of the Commission, including the Department of Defense.

2. The Electronic Privacy Information Center ("EPIC") challenges the Commission's intent to collect the personal data of millions of registered voters and to publish partial SSNs as an unconstitutional invasion of privacy and a violation of the agency's obligation to conduct a Privacy Impact Assessment ("PIA").

#### **Jurisdiction and Venue**

- 3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 702, and 5 U.S.C. § 704. This Court has personal jurisdiction over Defendants.
- 4. Venue is proper in this district under 5 U.S.C. § 703 and 28 U.S.C. § 1391.

#### **Parties**

- 5. Plaintiff EPIC is a nonprofit organization incorporated in Washington, D.C., and established in 1994 to focus public attention on emerging privacy and civil liberties issues.

  Central to EPIC's mission is oversight and analysis of government activities. EPIC's Advisory Board members include distinguished experts in law, technology, public policy, and cybersecurity. EPIC has a long history of working to protect voter privacy and the security of election infrastructure. EPIC has specific expertise regarding the misuse of the Social Security Number ("SSN") and has sought stronger protections for the SSN for more than two decades.
- 6. EPIC's members include registered voters in California, the District of Columbia, Florida, Maryland, Massachusetts, Minnesota, New York, Pennsylvania, Texas, and Washington.
- 7. Defendant PACEI is an advisory committee of the U.S. government within the meaning of FACA, 5 U.S.C. app. 2 § 10. Defendant PACEI is also an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.

- 8. Defendant Michael Pence is the Vice President of the United States and the Chair of the PACEI.
- 9. Defendant Kris Kobach is the Secretary of State of Kansas and the Vice Chair of the PACEI.
- 10. Defendant Executive Office of the President of the United States ("EOP") is an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.
- 11. Defendant Office of the Vice President of the United States ("OVP") is a subcomponent of EOP and an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.
- 12. Defendant General Services Administration ("GSA") is an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701. The GSA is charged with providing the PACEI "such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission . . . ." Ex. 1.1
- 13. Defendant United States Department of Defense ("DoD") is an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701. The DoD manages and controls the Safe Access File System ("SAFE").

#### **Facts**

#### The Commission's Unprecedented Collection of State Voter Data

14. The Commission was established by Executive Order on May 11, 2017 ("Commission Order"). Ex 1.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> Exec. Order. No. 13,799, 82 Fed. Reg. 22,389, 22,390 (May 11, 2017).

<sup>&</sup>lt;sup>2</sup> 82 Fed. Reg. at 22,389; *see also Voter Privacy and the PACEI*, EPIC.org (June 30, 2017), https://epic.org/privacy/voting/pacei/.

- 15. The Commission is charged with "study[ing] the registration and voting processes used in Federal elections." Ex. 1.<sup>3</sup> The Commission Order contains no authority to gather personal data or to undertake investigations.<sup>4</sup>
- 16. On June 28, 2017, the Vice Chair of the Commission undertook to collect detailed voter histories from all fifty states and the District of Columbia. Such a request had never been made by any federal official in the history of the country. The Vice Chair stated during a phone call with PACEI members that "a letter w[ould] be sent today to the 50 states and District of Columbia on behalf of the Commission requesting publicly-available data from state voter rolls . . . ." Ex. 2.5
- 17. According to the U.S. Census, state voter rolls include the names, addresses, and other personally identifiable information of at least 157 million registered voters.<sup>6</sup>
- 18. One of the letters from the Commission, dated June 28, 2017, was sent to North Carolina Secretary of State Elaine Marshall. Ex. 3.<sup>7</sup>
- 19. In the letter ("Commission Letter"), the Vice Chair urged the Secretary of State to provide to the Commission the "full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions,

<sup>&</sup>lt;sup>3</sup> 82 Fed. Reg. at 22,389.

<sup>&</sup>lt;sup>4</sup> See generally id.

<sup>&</sup>lt;sup>5</sup> Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017).

<sup>&</sup>lt;sup>6</sup> U.S. Census Bureau, *Voting and Registration in the Election of November 2016* at tbl. 4a (May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

<sup>&</sup>lt;sup>7</sup> Letter from Kris Kobach, Vice Chair, PACEI, to Elaine Marshall, Secretary of State, North Carolina (June 28, 2017).

information regarding voter registration in another state, information regarding military status, and overseas citizen information." Ex. 3.8

- 20. The Commission Letter also asked "[w]hat evidence or information [the state had] regarding instances of voter fraud or registration fraud" and "[w]hat convictions for election-related crimes ha[d] occurred in [the] state since the November 2000 federal election." Ex. 3.9
- 21. The Commission Letter stated that "any documents that are submitted to the full Commission w[ould] also be made available to the public." Ex. 3.<sup>10</sup>
- 22. The Commission asked for a response by July 14, 2017. Ex. 3.<sup>11</sup> The "SAFE" URL, recommend by the Commission for the submission of voter data, leads election officials to a non-secure site. Regarding this website, Google Chrome states: "Your connection is not private. Attackers may be trying to steal your information from [the site proposed by the Commission] (for example, passwords, messages, or credit cards)." Ex. 4.<sup>12</sup>
- 23. As of July 7, 2017, the Department of Defense has received voter data from at least one state, Arkansas, in the SAFE system.

#### Many States Oppose the Commission's Demand for Personal Voter Data

24. In less than three days following the release of the Commission Letter, election officials in twenty-four states said that they would oppose, partially or fully, the demand for personal voter data.<sup>13</sup>

<sup>&</sup>lt;sup>8</sup> *Id.* at 1–2.

<sup>&</sup>lt;sup>9</sup> *Id.* at 1.

<sup>&</sup>lt;sup>10</sup> *Id.* at 2.

<sup>&</sup>lt;sup>11</sup> *Id*.

<sup>&</sup>lt;sup>12</sup> Screenshot: Google Chrome Security Warning for Safe Access File Exchange ("SAFE") Site (July 3, 2017 12:02 AM).

<sup>&</sup>lt;sup>13</sup> Philip Bump & Christopher Ingraham, *Trump Says States Are 'Trying to Hide' Things from His Voter Fraud Commission. Here's What They Actually Say*, Wash. Post (July 1, 2017),

- 25. California Secretary of State Alex Padilla stated that he would "not provide sensitive voter information to a committee that has already inaccurately passed judgment that millions of Californians voted illegally. California's participation would only serve to legitimize the false and already debunked claims of massive voter fraud."<sup>14</sup>
- 26. Kentucky Secretary of State Alison Lundergan Grimes stated that "Kentucky w[ould] not aid a commission that is at best a waste of taxpayer money and at worst an attempt to legitimize voter suppression efforts across the country."
- 27. Virginia Governor Terry McAuliffe stated that he had "no intention of honoring [Kobach's] request." <sup>16</sup>
- 28. More than fifty experts in voting technology and twenty privacy organizations wrote to state election officials to warn that "[t]here is no indication how the information will be used, who will have access to it, or what safeguards will be established." 17

#### The Commission's Failure to Conduct a Privacy Impact Assessment

29. Under the E-Government Act of 2002,<sup>18</sup> any agency "initiating a new collection of information that (I) will be collected, maintained, or disseminated using information technology;

https://www.washingtonpost.com/news/wonk/wp/2017/07/01/trump-says-states-are-trying-to-hide-things-from-his-voter-fraud-commission-heres-what-they-actually-say/.

<sup>&</sup>lt;sup>14</sup> Press Release, Secretary of State Alex Padilla Responds to Presidential Election Commission Request for Personal Data of California Voters (June 29, 2017),

http://www.sos.ca.gov/administration/news-releases-and-advisories/2017-news-releases-and-advisories/secretary-state-alex-padilla-responds-presidential-election-commission-request-personal-data-california-voters/.

<sup>&</sup>lt;sup>15</sup> Bradford Queen, Secretary Grimes Statement on Presidential Election Commission's Request for Voters' Personal Information, Kentucky (last accessed July 3, 2017) http://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=129.

<sup>&</sup>lt;sup>16</sup> Terry McAuliffe, Governor McAuliffe Statement on Request from Trump Elections Commission (June 29, 2017),

https://governor.virginia.gov/newsroom/newsarticle?articleId=20595.

<sup>&</sup>lt;sup>17</sup> Letter from EPIC et al. to Nat'l Ass'n of State Sec'ys (July 3, 2017), https://epic.org/privacy/voting/pacei/Voter-Privacy-letter-to-NASS-07032017.pdf.

and (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual" is required to complete a Privacy Impact Assessment ("PIA") before initiating such collection.<sup>19</sup>

- 30. The agency must "(i) conduct a privacy impact assessment; (ii) ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and (iii) if practicable, after completion of the review under clause (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means."<sup>20</sup>
- 31. The PACEI is an agency subject to the E-Government Act because it is an "establishment in the executive branch of the Government," a category which "includ[es] the Executive Office of the President."
- 32. A Privacy Impact Assessment for a "new collection of information" must be "commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information." The PIA must specifically address "(I) what information is to be collected; (II) why the information is being collected; (III) the intended use of the agency of the information; (IV) with whom the information will be shared; (V) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared; [and] (VI) how the information will be secured . . . ."<sup>23</sup>

<sup>&</sup>lt;sup>18</sup> Pub. L. 107–347, 116 Stat. 2899 (codified as amended at 44 U.S.C. § 3501 note).

<sup>&</sup>lt;sup>19</sup> 44 U.S.C. § 3501 note ("Privacy Impact Assessments").

 $<sup>^{20}</sup>$  *Id* 

<sup>&</sup>lt;sup>21</sup> 44 U.S.C. § 3502(1).

<sup>&</sup>lt;sup>22</sup> § 3501 note ("Privacy Impact Assessments").

 $<sup>^{23}</sup>$  *Id*.

- 33. Under the FACA, "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [an] advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist."<sup>24</sup>
- 34. The Commission has not conducted a Privacy Impact Assessment for its collection of state voter data.
- 35. The Commission has not ensured review of a PIA by any Chief Information Officer or equivalent official.
- 36. The Commission has not published a PIA or made such an assessment available for public inspection.

#### <u>The DoD's Privacy Impact Assessment Does Not Permit</u> the Collection of Personal Information from The General Public

- 37. The DoD last approved a PIA for the Safe Access File Exchange system in 2015.<sup>25</sup>
- 38. The 2015 PIA indicates that the SAFE system may "collect, maintain, use and/or disseminate PII" about only "federal personnel and/or federal contractors." <sup>26</sup>
- 39. The 2015 PIA specifically indicates that the SAFE system may <u>not</u> be used to "collect, maintain, use and/or disseminate PII" from "members of the general public."<sup>27</sup>
- 40. According to the 2015 PIA, the SAFE system may not be used to collect the data set out in the June 28, 2017, from Vice Chair Kobach, directing state election officials to provide voter roll data.

<sup>&</sup>lt;sup>24</sup> 5 U.S.C. app. 2 § 10(b).

<sup>&</sup>lt;sup>25</sup> Army Chief Information Officer, U.S. Dep't of Def., *Privacy Impact Assessments* (April 27, 2016), http://ciog6.army.mil/PrivacyImpactAssessments/tabid/71/Default.aspx.

<sup>&</sup>lt;sup>26</sup> EPIC Supp. Ex. 5, ECF No. 20-1, at 1.

<sup>&</sup>lt;sup>27</sup> EPIC Supp. Ex. 5, ECF No. 20-1, at 1.

- 41. The DoD has not issued a PIA for the collection of personal data from the general public.
- 42. The DoD has not issued a PIA that would permit the receipt of data specified in the June 28, 2017, Kobach letter.

#### Count I

#### Violation of APA: Unlawful Agency Action

- 43. Plaintiff asserts and incorporates by reference paragraphs 1–42.
- 44. Defendants' collection of state voter data prior to creating, reviewing, and publishing a Privacy Impact Assessment, 44 U.S.C. § 3501 note, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(a) and short of statutory right under 5 U.S.C. § 706(2)(c).
- 45. Defendants' decision to initiate collection of voter data is a final agency action within the meaning of 5 U.S.C. § 704.
- 46. Plaintiff, by itself and as a representative of its members, is adversely affected and aggrieved by Defendants' actions.
- 47. Plaintiff has exhausted all applicable administrative remedies.

#### **Count II**

#### Violation of APA: Agency Action Unlawfully Withheld

- 48. Plaintiff asserts and incorporates by reference paragraphs 1–42.
- 49. Defendants have failed to create, review, and/or publish a privacy impact assessment for Defendants' collection of voter data, as required by 44 U.S.C. § 3501 note and 5 U.S.C. app. 2 § 10(b).
- 50. Defendants' failure to take these steps constitutes agency action unlawfully withheld or unreasonably delayed in violation of 5 U.S.C. § 706(1).

- 51. Plaintiff, by itself and as a representative of its members, is adversely affected and aggrieved by Defendants' actions and inaction.
- 52. Plaintiff has exhausted all applicable administrative remedies.

#### **Count III**

#### **Violation of FACA: Failure to Make Documents Available for Public Inspection**

- 53. Plaintiff asserts and incorporates by reference paragraphs 1–42.
- 54. Defendants have failed to make available for public inspection a privacy impact assessment for the collection of voter data.
- 55. Defendants' failure to make available for public inspection a PIA required by law is a violation of 5 U.S.C. app. 2 § 10(b).
- 56. Plaintiff, by itself and as a representative of its members, is adversely affected and aggrieved by Defendants' actions and inaction.
- 57. Plaintiff has exhausted all applicable administrative remedies.

#### **Count IV**

#### Violation of Fifth Amendment: Substantive Due Process/Right to Informational Privacy

- 58. Plaintiff asserts and incorporates by reference paragraphs 1–42.
- 59. Defendants, by seeking to assemble an unnecessary and excessive federal database of sensitive voter data from state records systems, have violated the informational privacy rights of millions of Americans, including members of the EPIC Advisory Board, guaranteed by the Due Process Clause of the Fifth Amendment. *See* U.S. Const. amend. V; *NASA v. Nelson*, 562 U.S. 134, 138 (2011); *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977); *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

60. Plaintiff, as a representative of its members, is adversely affected and aggrieved by Defendants' actions.

#### Count V

#### **Violation of Fifth Amendment: Procedural Due Process**

- 61. Plaintiff asserts and incorporates by reference paragraphs 1–42.
- 62. Defendants, by seeking to assemble an unnecessary and excessive federal database of sensitive voter data from state records systems, have deprived EPIC's members of their liberty interest in avoiding the disclosure of personal matters. U.S. Const. amend. V; *NASA v. Nelson*, 562 U.S. 134, 138 (2011); *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977); *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).
- 63. Defendants have done so without providing notice to EPIC's members, without providing EPIC's members an opportunity to challenge the collection of their personal data, and without providing for a neutral decisionmaker to decide on any such challenges brought by EPIC's members.
- 64. Defendants have violated EPIC's members Fifth Amendment right to due process of law. U.S. Const. amend. V.
- 65. Plaintiff, as a representative of its members, is adversely affected and aggrieved by Defendants' actions and inaction.

#### **Requested Relief**

WHEREFORE, Plaintiff requests that this Court:

- A. Hold unlawful and set aside Defendants' authority to collect personal voter data from the states;
- B. Order Defendants to halt collection of personal voter data;

- C. Order Defendants to securely delete and properly disgorge any personal voter data collected or subsequently received;
- D. Order Defendants to promptly conduct a privacy impact assessment prior to the collection of personal voter data;
- E. Award EPIC costs and reasonable attorney's fees incurred in this action; and
- F. Grant such other relief as the Court may deem just and proper.

Respectfully Submitted,

/s/ Marc Rotenberg
MARC ROTENBERG, D.C. Bar # 422825
EPIC President and Executive Director

ALAN BUTLER, D.C. Bar # 1012128 EPIC Senior Counsel

ELECTRONIC PRIVACY INFORMATION CENTER 1718 Connecticut Avenue, N.W. Suite 200 Washington, D.C. 20009 (202) 483-1140 (telephone) (202) 483-1248 (facsimile)

Dated: July 7, 2017

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, et al.,

Defendants.

Civil Action No. 17-1320 (CKK)

#### **ORDER**

(July 10, 2017)

The Court has received Plaintiff's Amended Complaint, ECF No. 21, which has added the Department of Defense as a party to this litigation. The Amended Complaint was filed as of right pursuant to Federal Rule of Civil Procedure 15(a)(1)(A). The Court shall apply all of the arguments made in Defendants' briefing to the Department of Defense, and has received substantial testimony on the propriety of injunctive relief against the Department of Defense during the motions hearing held on July 7, 2017. The Court has reviewed the transcript of that hearing with respect to the Department of Defense. Accordingly, while it has not reached any decision regarding the merits of Plaintiff's request for injunctive relief, the Court does not see a need for supplemental briefing at this time. Nonetheless, in an abundance of caution, the Court shall permit Defendants to file supplemental briefing, solely with respect to issues particular to the Department of Defense, by 4:00 P.M. on July 10, 2017.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, et al.,

Defendants.

Plaintiff,

Civil Action No. 1:17-cv-1320 (CKK)

## DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING THE DEPARTMENT OF DEFENSE

In response to Plaintiff's Amended Complaint (which has not been served in accordance with Fed. R. Civ. P. 4), ECF No. 21, and in compliance with this Court's Order, ECF No. 22, Defendants respectfully submit that the entry of a temporary restraining order against the Department of Defense ("DOD") would be improper:

- Defendants respectfully update the Court of two factual developments since the July 7, 2017 hearing.
  - a. In order not to impact the ability of other customers to use the DOD Safe

    Access File Exchange ("SAFE") site, the Commission the Commission has
    decided to use alternative means for transmitting the requested data. Third

    Kobach Decl. ¶ 1. The Commission no longer intends to use the DOD SAFE
    system to receive information from the states, and instead intends to use

- alternative means of receiving the information requested in the June 28, 2017, letter *Id.* Director of White House Information Technology is repurposing an existing system that regularly accepts personally identifiable information through a secure, encrypted computer application within the White House Information Technology enterprise. *Id.* The system is anticipated to be fully functional by 6:00 pm EDT today. *Id.*
- b. Today, July 10, 2017, the Commission also sent the states a follow-up communication requesting the states not submit any data until this Court rules on plaintiff's TRO motion. *Id.* ¶ 2. Furthermore, the Commission will not send further instructions about how to use the new system pending this Court's resolution of the TRO motion. *Id.*
- c. The Commission will not download the data that Arkansas already transmitted to SAFE and this data will be deleted from this site. *Id.* ¶ 3.
- 2. In light of these factual developments, any relief against DOD would be inappropriate because DOD systems will not be used by the Commission, and thus an order against DOD would not redress EPIC's supposed injury. *See, e.g., Gerber Prods. Co. v. Vilsack*, No. 16-1696-APM, 2016 WL 4734357, at \*5 (D.D.C. Sept. 9, 2016) ("No order directed against [defendants] alone could cure the harm claimed by Plaintiff.").
- 3. Furthermore, DOD was not the subject of Plaintiff's motion for a TRO. While Plaintiff is entitled to amend its complaint as a matter of right, *see* Fed. R. Civ. P. 15(a)(1)(A), it must also amend and serve its TRO motion making clear what relief it seeks against DOD and why it is entitled to such relief. *See* LCvR 65(a). DOD, in

turn, should be given the opportunity to respond before any order is entered against it, including the opportunity to articulate what harm could be caused by the entry of a restraining order.

Dated: July 10, 2017

Respectfully submitted,

CHAD A. READLER Acting Assistant Attorney General Civil Division

BRETT A. SHUMATE Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO Deputy Director

/s/ Joseph E. Borson
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Washington, DC 20044
Phone: (202) 514-1944

Counsel for Defendants

Email: joseph.borson@usdoj.gov

#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**ELECTRONIC PRIVACY INFORMATION** CENTER,

Civil Action No. 1:17-cv-1320 (CKK)

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, et al.,

Defendants.

#### THIRD DECLARATION OF KRIS W. KOBACH

I, Kris W. Kobach, declare as follows:

As described in my declaration of July 5, 2017, I am the Vice Chair of the Presidential Advisory Commission on Election Integrity ("Commission"). I submit this third declaration in support of Defendant's supplemental brief regarding the addition of the Department of Defense ("DOD") as a defendant in plaintiff's Amended Complaint. This declaration is based on my personal knowledge and upon information provided to me in my official capacity as Vice Chair of the Commission.

1. In order not to impact the ability of other customers to use the DOD Safe Access File Exchange ("SAFE") site, the Commission has decided to use alternative means for transmitting the requested data. The Commission no longer intends to use the DOD SAFE system to receive information from the states, and instead intends to use alternative means of receiving the information requested in the June 28, 2017, letter. Specifically, the Director of White House Information Technology is repurposing an existing system that regularly accepts

personally identifiable information through a secure, encrypted computer application within the White House Information Technology enterprise. We anticipate this system will be fully functional by 6:00 p.m. Eastern today.

2. Today, the Commission sent the states a follow-up communication requesting the states not submit any data until this Court rules on this TRO motion. A copy of this communication is attached hereto as Exhibit A. The Commission will not send further instructions about how to use the new system pending this Court's resolution of this TRO motion.

3. The Commission will not download the data that Arkansas already transmitted to SAFE and this data will be deleted from the site.

4. Additionally, I anticipate that the President will today announce the appointment of two new members of the Commission, one Democrat and one Republican.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

\*\*\*

Executed this 10th day of July 2017.

Kris W. Kobach

Kris Kobach

## EXHIBIT A

**From:** FN-OVP-Election Integrity Staff **Sent:** Monday, July 10, 2017 9:40 AM

**Subject:** Request to Hold on Submitting Any Data Until Judge Rules on TRO

Dear Election Official,

As you may know, the Electronic Privacy Information Center filed a complaint seeking a Temporary Restraining Order ("TRO") in connection with the June 28, 2017 letter sent by Vice Chair Kris Kobach requesting publicly-available voter data. See *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity* filed in the U.S. District Court for the District of Columbia. Until the Judge rules on the TRO, we request that you hold on submitting any data. We will follow up with you with further instructions once the Judge issues her ruling.

Andrew Kossack
Designated Federal Officer
Presidential Advisory Commission on Election Integrity
ElectionIntegrityStaff@ovp.eop.gov



## THE VICE PRESIDENT WASHINGTON

June 26, 2017

Timothy O. Horne Acting Administrator General Services Administration 1800 F Street, NW Washington, D.C. 20405

Dear Acting Administrator Horne:

Pursuant to Executive Order 13799 and the President's delegation of authority to the Administrator of the General Services Administration to appoint a Designated Federal Officer under 41 C.F.R. §102-3.105(i), I recommend Andrew J. Kossack, Associate Counsel in the Office of the Vice President, as the Designated Federal Officer for the Presidential Advisory Commission on Election Integrity.

Thank you for your assistance and leadership.

Michael R. Pence

Vice President of the United States of America

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
£ ,

Plaintiff,

V.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his official capacity as Chair of the Presidential Advisory Commission on Election Integrity; KRIS KOBACH, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES; OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES;

The White House 1600 Pennsylvania Avenue, N.W. Washington, D.C. 20500

GENERAL SERVICES ADMINISTRATION 1800 F Street, N.W. Washington, D.C. 20405

Defendants.

Civil	A ation No	
CIVII	Action No.	

#### COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–706, the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2, and the United States Constitution for injunctive and other appropriate relief to halt the collection of state voter data by the Presidential Advisory Commission on Election Integrity (the "PACEI" or the

"Commission"), by officers of the Commission, and by the agencies which oversee and facilitate the activities of the Commission.

2. The Electronic Privacy Information Center ("EPIC") challenges the Commission's intent to collect the personal data of millions of registered voters and to publish partial SSNs as an unconstitutional invasion of privacy and a violation of the agency's obligation to conduct a Privacy Impact Assessment ("PIA").

#### Jurisdiction and Venue

- 3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 702, and 5 U.S.C. § 704. This Court has personal jurisdiction over Defendants.
- 4. Venue is proper in this district under 5 U.S.C. § 703 and 28 U.S.C. § 1391.

#### **Parties**

- 5. Plaintiff EPIC is a nonprofit organization incorporated in Washington, D.C., and established in 1994 to focus public attention on emerging privacy and civil liberties issues. Central to EPIC's mission is oversight and analysis of government activities. EPIC's Advisory Board members include distinguished experts in law, technology, public policy, and cybersecurity. EPIC has a long history of working to protect voter privacy and the security of election infrastructure. EPIC has specific expertise regarding the misuse of the Social Security Number ("SSN") and has sought stronger protections for the SSN for more than two decades.
- 6. EPIC's members include registered voters in California, the District of Columbia, Florida, Maryland, Massachusetts, Minnesota, New York, Pennsylvania, Texas, and Washington.
- 7. Defendant PACEI is an advisory committee of the U.S. government within the meaning of FACA, 5 U.S.C. app. 2 § 10. Defendant PACEI is also an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.

- 8. Defendant Michael Pence is the Vice President of the United States and the Chair of the PACEI.
- 9. Defendant Kris Kobach is the Secretary of State of Kansas and the Vice Chair of the PACEI.
- 10. Defendant Executive Office of the President of the United States ("EOP") is an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.
- 11. Defendant Office of the Vice President of the United States ("OVP") is a subcomponent of EOP and an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.
- 12. Defendant General Services Administration ("GSA") is an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701. The GSA is charged with providing the PACEI "such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission . . . ." Ex. 1.1

#### **Facts**

#### The Commission's Unprecedented Collection of State Voter Data

- 13. The Commission was established by Executive Order on May 11, 2017 ("Commission Order"). Ex  $1.^2$
- 14. The Commission is charged with "study[ing] the registration and voting processes used in Federal elections." Ex. 1.<sup>3</sup> The Commission Order contains no authority to gather personal data or to undertake investigations.<sup>4</sup>
- 15. On June 28, 2017, the Vice Chair of the Commission undertook to collect detailed voter histories from all fifty states and the District of Columbia. Such a request had never been made

<sup>&</sup>lt;sup>1</sup> Exec. Order. No. 13,799, 82 Fed. Reg. 22,389, 22,390 (May 11, 2017).

<sup>&</sup>lt;sup>2</sup> 82 Fed. Reg. at 22,389; *see also Voter Privacy and the PACEI*, EPIC.org (June 30, 2017), https://epic.org/privacy/voting/pacei/.

<sup>&</sup>lt;sup>3</sup> 82 Fed. Reg. at 22,389.

<sup>&</sup>lt;sup>4</sup> See generally id.

by any federal official in the history of the country. The Vice Chair stated during a phone call with PACEI members that "a letter w[ould] be sent today to the 50 states and District of Columbia on behalf of the Commission requesting publicly-available data from state voter rolls . . . ." Ex. 2.5

- 16. According to the U.S. Census, state voter rolls include the names, addresses, and other personally identifiable information of at least 157 million registered voters.<sup>6</sup>
- 17. One of the letters from the Commission, dated June 28, 2017, was sent to North Carolina Secretary of State Elaine Marshall. Ex. 3.<sup>7</sup>
- 18. In the letter ("Commission Letter"), the Vice Chair urged the Secretary of State to provide to the Commission the "full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information." Ex. 3.8
- 19. The Commission Letter also asked "[w]hat evidence or information [the state had] regarding instances of voter fraud or registration fraud" and "[w]hat convictions for election-related crimes ha[d] occurred in [the] state since the November 2000 federal election." Ex. 3.9

<sup>&</sup>lt;sup>5</sup> Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017).

<sup>&</sup>lt;sup>6</sup> U.S. Census Bureau, *Voting and Registration in the Election of November 2016* at tbl. 4a (May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

<sup>&</sup>lt;sup>7</sup> Letter from Kris Kobach, Vice Chair, PACEI, to Elaine Marshall, Secretary of State, North Carolina (June 28, 2017).

<sup>&</sup>lt;sup>8</sup> *Id.* at 1–2.

<sup>&</sup>lt;sup>9</sup> *Id.* at 1.

- 20. The Commission Letter stated that "any documents that are submitted to the full Commission w[ould] also be made available to the public." Ex. 3.<sup>10</sup>
- 21. The Commission asked for a response by July 14, 2017. Ex. 3.<sup>11</sup> The "SAFE" URL, recommend by the Commission for the submission of voter data, leads election officials to a non-secure site. Regarding this website, Google Chrome states: "Your connection is not private. Attackers may be trying to steal your information from [the site proposed by the Commission] (for example, passwords, messages, or credit cards)." Ex. 4.<sup>12</sup>

#### Many States Oppose the Commission's Demand for Personal Voter Data

- 22. In less than three days following the release of the Commission Letter, election officials in twenty-four states said that they would oppose, partially or fully, the demand for personal voter data.<sup>13</sup>
- 23. California Secretary of State Alex Padilla stated that he would "not provide sensitive voter information to a committee that has already inaccurately passed judgment that millions of Californians voted illegally. California's participation would only serve to legitimize the false and already debunked claims of massive voter fraud."<sup>14</sup>

<sup>12</sup> Screenshot: Google Chrome Security Warning for Safe Access File Exchange ("SAFE") Site (July 3, 2017 12:02 AM).

<sup>&</sup>lt;sup>10</sup> *Id.* at 2.

<sup>&</sup>lt;sup>11</sup> *Id*.

Philip Bump & Christopher Ingraham, *Trump Says States Are 'Trying to Hide' Things from His Voter Fraud Commission. Here's What They Actually Say*, Wash. Post (July 1, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/01/trump-says-states-are-trying-to-hide-things-from-his-voter-fraud-commission-heres-what-they-actually-say/.

<sup>&</sup>lt;sup>14</sup> Press Release, Secretary of State Alex Padilla Responds to Presidential Election Commission Request for Personal Data of California Voters (June 29, 2017), http://www.sos.ca.gov/administration/news-releases-and-advisories/2017-news-releases-and-advisories/secretary-state-alex-padilla-responds-presidential-election-commission-request-personal-data-california-voters/.

- 24. Kentucky Secretary of State Alison Lundergan Grimes stated that "Kentucky w[ould] not aid a commission that is at best a waste of taxpayer money and at worst an attempt to legitimize voter suppression efforts across the country."<sup>15</sup>
- 25. Virginia Governor Terry McAuliffe stated that he had "no intention of honoring [Kobach's] request." <sup>16</sup>
- 26. More than fifty experts in voting technology and twenty privacy organizations wrote to state election officials to warn that "[t]here is no indication how the information will be used, who will have access to it, or what safeguards will be established."

#### The Commission's Failure to Conduct a Privacy Impact Assessment

- 27. Under the E-Government Act of 2002, <sup>18</sup> any agency "initiating a new collection of information that (I) will be collected, maintained, or disseminated using information technology; and (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual" is required to complete a Privacy Impact Assessment ("PIA") before initiating such collection.<sup>19</sup>
- 28. The agency must "(i) conduct a privacy impact assessment; (ii) ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and (iii) if practicable, after completion of the review under clause

6

<sup>&</sup>lt;sup>15</sup> Bradford Queen, Secretary Grimes Statement on Presidential Election Commission's Request for Voters' Personal Information, Kentucky (last accessed July 3, 2017) http://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=129.

<sup>&</sup>lt;sup>16</sup> Terry McAuliffe, Governor McAuliffe Statement on Request from Trump Elections Commission (June 29, 2017),

https://governor.virginia.gov/newsroom/newsarticle?articleId=20595.

<sup>&</sup>lt;sup>17</sup> Letter from EPIC et al. to Nat'l Ass'n of State Sec'ys (July 3, 2017),

https://epic.org/privacy/voting/pacei/Voter-Privacy-letter-to-NASS-07032017.pdf.

<sup>&</sup>lt;sup>18</sup> Pub. L. 107–347, 116 Stat. 2899 (codified as amended at 44 U.S.C. § 3501 note).

<sup>&</sup>lt;sup>19</sup> 44 U.S.C. § 3501 note ("Privacy Impact Assessments").

- (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means."<sup>20</sup>
- 29. The PACEI is an agency subject to the E-Government Act because it is an "establishment in the executive branch of the Government," a category which "includ[es] the Executive Office of the President."
- 30. A Privacy Impact Assessment for a "new collection of information" must be "commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information." The PIA must specifically address "(I) what information is to be collected; (II) why the information is being collected; (III) the intended use of the agency of the information; (IV) with whom the information will be shared; (V) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared; [and] (VI) how the information will be secured . . . ."<sup>23</sup>
- 31. Under the FACA, "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [an] advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist."<sup>24</sup>
- 32. The Commission has not conducted a Privacy Impact Assessment for its collection of state voter data.

<sup>&</sup>lt;sup>20</sup> *Id*.

<sup>&</sup>lt;sup>21</sup> 44 U.S.C. § 3502(1).

<sup>&</sup>lt;sup>22</sup> § 3501 note ("Privacy Impact Assessments").

 $<sup>^{23}</sup>$  Id

<sup>&</sup>lt;sup>24</sup> 5 U.S.C. app. 2 § 10(b).

- 33. The Commission has not ensured review of a PIA by any Chief Information Officer or equivalent official.
- 34. The Commission has not published a PIA or made such an assessment available for public inspection.

#### Count I

#### Violation of APA: Unlawful Agency Action

- 35. Plaintiff asserts and incorporates by reference paragraphs 1–35.
- 36. Defendants' collection of state voter data prior to creating, reviewing, and publishing a Privacy Impact Assessment, 44 U.S.C. § 3501 note, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(a) and short of statutory right under 5 U.S.C. § 706(2)(c).
- 37. Defendants' decision to initiate collection of voter data is a final agency action within the meaning of 5 U.S.C. § 704.
- 38. Plaintiff, by itself and as a representative of its members, is adversely affected and aggrieved by Defendants' actions.
- 39. Plaintiff has exhausted all applicable administrative remedies.

#### **Count II**

#### Violation of APA: Agency Action Unlawfully Withheld

- 40. Plaintiff asserts and incorporates by reference paragraphs 1–35.
- 41. Defendants have failed to create, review, and/or publish a privacy impact assessment for Defendants' collection of voter data, as required by 44 U.S.C. § 3501 note and 5 U.S.C. app. 2 § 10(b).

- 42. Defendants' failure to take these steps constitutes agency action unlawfully withheld or unreasonably delayed in violation of 5 U.S.C. § 706(1).
- 43. Plaintiff, by itself and as a representative of its members, is adversely affected and aggrieved by Defendants' actions and inaction.
- 44. Plaintiff has exhausted all applicable administrative remedies.

#### **Count III**

#### **Violation of FACA: Failure to Make Documents Available for Public Inspection**

- 45. Plaintiff asserts and incorporates by reference paragraphs 1–35.
- 46. Defendant PACEI has failed to make available for public inspection a privacy impact assessment for the PACEI's collection of voter data.
- 47. Defendant PACEI's failure to do so is a violation of 5 U.S.C. app. 2 § 10(b).
- 48. Plaintiff, by itself and as a representative of its members, is adversely affected and aggrieved by Defendant PACEI's actions and inaction.
- 49. Plaintiff has exhausted all applicable administrative remedies.

#### **Count IV**

#### **Violation of Fifth Amendment: Substantive Due Process/Right to Informational Privacy**

- 50. Plaintiff asserts and incorporates by reference paragraphs 1–35.
- Defendants, by seeking to assemble an unnecessary and excessive federal database of sensitive voter data from state records systems, have violated the informational privacy rights of millions of Americans, including members of the EPIC Advisory Board, guaranteed by the Due Process Clause of the Fifth Amendment. *See* U.S. Const. amend. V; *NASA v. Nelson*, 562 U.S. 134, 138 (2011); *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977); *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

52. Plaintiff, as a representative of its members, is adversely affected and aggrieved by Defendants' actions.

#### Count V

#### **Violation of Fifth Amendment: Procedural Due Process**

- 53. Plaintiff asserts and incorporates by reference paragraphs 1–35.
- 54. Defendants, by seeking to assemble an unnecessary and excessive federal database of sensitive voter data from state records systems, have deprived EPIC's members of their liberty interest in avoiding the disclosure of personal matters. U.S. Const. amend. V; *NASA v. Nelson*, 562 U.S. 134, 138 (2011); *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977); *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).
- 55. Defendants have done so without providing notice to EPIC's members, without providing EPIC's members an opportunity to challenge the collection of their personal data, and without providing for a neutral decisionmaker to decide on any such challenges brought by EPIC's members.
- 56. Defendants have violated EPIC's members Fifth Amendment right to due process of law. U.S. Const. amend. V.
- 57. Plaintiff, as a representative of its members, is adversely affected and aggrieved by Defendants' actions and inaction.

#### **Requested Relief**

WHEREFORE, Plaintiff requests that this Court:

- A. Hold unlawful and set aside Defendants' authority to collect personal voter data from the states;
- B. Order Defendants to halt collection of personal voter data;

- C. Order Defendants to securely delete and properly disgorge any personal voter data collected or subsequently received;
- D. Order Defendants to promptly conduct a privacy impact assessment prior to the collection of personal voter data;
- E. Award EPIC costs and reasonable attorney's fees incurred in this action; and
- F. Grant such other relief as the Court may deem just and proper.

Respectfully Submitted,

/s/ Marc Rotenberg
MARC ROTENBERG, D.C. Bar # 422825
EPIC President and Executive Director

ALAN BUTLER, D.C. Bar # 1012128 EPIC Senior Counsel

ELECTRONIC PRIVACY INFORMATION CENTER 1718 Connecticut Avenue, N.W. Suite 200 Washington, D.C. 20009 (202) 483-1140 (telephone) (202) 483-1248 (facsimile)

Dated: July 3, 2017

#### LIST OF EXHIBITS

Exhibit 1	Exec. Order. No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017)
Exhibit 2	Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017)
Exhibit 3	Letter from Kris Kobach, Vice Chair, Presidential Advisory Commission on Election Integrity, to Elaine Marshall, Secretary of State, North Carolina (June 28, 2017)
Exhibit 4	Screenshot: Google Chrome Security Warning for Safe Access File Exchange ("SAFE") Website (July 3, 2017 12:02 AM)

# Exhibit 1



#### Federal Register

Vol. 82, No. 93

Tuesday, May 16, 2017

#### **Presidential Documents**

#### Title 3—

#### The President

Executive Order 13799 of May 11, 2017

# **Establishment of Presidential Advisory Commission on Election Integrity**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote fair and honest Federal elections, it is hereby ordered as follows:

**Section 1.** *Establishment.* The Presidential Advisory Commission on Election Integrity (Commission) is hereby established.

- **Sec. 2**. *Membership*. The Vice President shall chair the Commission, which shall be composed of not more than 15 additional members. The President shall appoint the additional members, who shall include individuals with knowledge and experience in elections, election management, election fraud detection, and voter integrity efforts, and any other individuals with knowledge or experience that the President determines to be of value to the Commission. The Vice President may select a Vice Chair of the Commission from among the members appointed by the President.
- **Sec. 3.** *Mission*. The Commission shall, consistent with applicable law, study the registration and voting processes used in Federal elections. The Commission shall be solely advisory and shall submit a report to the President that identifies the following:
- (a) those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections;
- (b) those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections; and
- (c) those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting.
- **Sec. 4**. *Definitions*. For purposes of this order:
- (a) The term "improper voter registration" means any situation where an individual who does not possess the legal right to vote in a jurisdiction is included as an eligible voter on that jurisdiction's voter list, regardless of the state of mind or intent of such individual.
- (b) The term "improper voting" means the act of an individual casting a non-provisional ballot in a jurisdiction in which that individual is ineligible to vote, or the act of an individual casting a ballot in multiple jurisdictions, regardless of the state of mind or intent of that individual.
- (c) The term "fraudulent voter registration" means any situation where an individual knowingly and intentionally takes steps to add ineligible individuals to voter lists.
- (d) The term "fraudulent voting" means the act of casting a non-provisional ballot or multiple ballots with knowledge that casting the ballot or ballots is illegal.
- **Sec. 5**. Administration. The Commission shall hold public meetings and engage with Federal, State, and local officials, and election law experts, as necessary, to carry out its mission. The Commission shall be informed by, and shall strive to avoid duplicating, the efforts of existing government entities. The Commission shall have staff to provide support for its functions.

- **Sec. 6**. *Termination*. The Commission shall terminate 30 days after it submits its report to the President.
- **Sec. 7.** *General Provisions.* (a) To the extent permitted by law, and subject to the availability of appropriations, the General Services Administration shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission on a reimbursable basis.
- (b) Relevant executive departments and agencies shall endeavor to cooperate with the Commission.
- (c) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (the "Act"), may apply to the Commission, any functions of the President under that Act, except for those in section 6 of the Act, shall be performed by the Administrator of General Services.
- (d) Members of the Commission shall serve without any additional compensation for their work on the Commission, but shall be allowed travel expenses, including per diem in lieu of subsistence, to the extent permitted by law for persons serving intermittently in the Government service (5 U.S.C. 5701–5707).
  - (e) Nothing in this order shall be construed to impair or otherwise affect:
  - (i) the authority granted by law to an executive department or agency, or the head thereof; or
  - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (f) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (g) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sundsamm

THE WHITE HOUSE, May 11, 2017.

# Exhibit 2

the WHITE HOUSE





#### From the Press Office

Speeches & Remarks

Press Briefings

#### **Statements & Releases**

Nominations & Appointments

**Presidential Actions** 

Legislation

**Disclosures** 

#### The White House

Office of the Vice President

For Immediate Release

June 28, 2017

# Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity

This morning, Vice President Mike Pence held an organizational call with members of the Presidential Advisory Commission on Election Integrity. The Vice President reiterated President Trump's charge to the commission with producing a set of recommendations to increase the American people's confidence in the integrity of our election systems.

"The integrity of the vote is a foundation of our democracy; this bipartisan commission will review ways to strengthen that integrity in order to protect and preserve the principle of one person, one vote," the Vice President told commission members today.

The commission set July 19 as its first meeting, which will take place in Washington, D.C.

Vice Chair of the Commission and Kansas Secretary of State Kris Kobach told members a letter will be sent today to the 50 states and District of Columbia on behalf of the Commission requesting publicly-available data from state voter rolls and feedback on how to improve election integrity.



HOME BRIEFING ROOM ISSUES THE ADMINISTRATION PARTICIPATE 1600 PENN

USA.gov Privacy Policy Copyright Policy

# Exhibit 3

#### **Presidential Advisory Commission on Election Integrity**

June 28, 2017

The Honorable Elaine Marshall Secretary of State PO Box 29622 Raleigh, NC 27626-0622

Dear Secretary Marshall,

I serve as the Vice Chair for the Presidential Advisory Commission on Election Integrity ("Commission"), which was formed pursuant to Executive Order 13799 of May 11, 2017. The Commission is charged with studying the registration and voting processes used in federal elections and submitting a report to the President of the United States that identifies laws, rules, policies, activities, strategies, and practices that enhance or undermine the American people's confidence in the integrity of federal elections processes.

As the Commission begins it work, I invite you to contribute your views and recommendations throughout this process. In particular:

- 1. What changes, if any, to federal election laws would you recommend to enhance the integrity of federal elections?
- 2. How can the Commission support state and local election administrators with regard to information technology security and vulnerabilities?
- 3. What laws, policies, or other issues hinder your ability to ensure the integrity of elections you administer?
- 4. What evidence or information do you have regarding instances of voter fraud or registration fraud in your state?
- 5. What convictions for election-related crimes have occurred in your state since the November 2000 federal election?
- 6. What recommendations do you have for preventing voter intimidation or disenfranchisement?
- 7. What other issues do you believe the Commission should consider?

In addition, in order for the Commission to fully analyze vulnerabilities and issues related to voter registration and voting, I am requesting that you provide to the Commission the publicly-available voter roll data for North Carolina, including, if publicly available under the laws of your state, the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social

security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.

You may submit your responses electronically to <u>ElectionIntegrityStaff@ovp.eop.gov</u> or by utilizing the Safe Access File Exchange ("SAFE"), which is a secure FTP site the federal government uses for transferring large data files. You can access the SAFE site at <a href="https://safe.amrdec.army.mil/safe/Welcome.aspx">https://safe.amrdec.army.mil/safe/Welcome.aspx</a>. We would appreciate a response by July 14, 2017. Please be aware that any documents that are submitted to the full Commission will also be made available to the public. If you have any questions, please contact Commission staff at the same email address.

On behalf of my fellow commissioners, I also want to acknowledge your important leadership role in administering the elections within your state and the importance of state-level authority in our federalist system. It is crucial for the Commission to consider your input as it collects data and identifies areas of opportunity to increase the integrity of our election systems.

I look forward to hearing from you and working with you in the months ahead.

Sincerely,

Kris W. Kobach Vice Chair

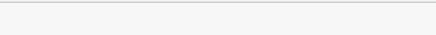
vice Chan

Kris Kobach

Presidential Advisory Commission on Election Integrity

# Exhibit 4







### Your connection is not private

Attackers might be trying to steal your information from safe.amrdec.army.mil (for example, passwords, messages, or credit cards). NET::ERR\_CERT\_AUTHORITY\_INVALID

Automatically send some <u>system information and page content</u> to Google to help detect dangerous apps and sites. <u>Privacy policy</u>



Back to safety

# GENERAL SERVICES ADMINISTRATION Washington, DC 20405

ADM 5420.40E July 21, 2016

#### **GSA ORDER**

SUBJECT: GSA Federal Advisory Committee Management Program

- 1. <u>Purpose</u>. This policy transmits the new "GSA Federal Advisory Committee Management Program."
- 2. <u>Scope and applicability</u>. This policy applies to all U.S. General Services Administration (GSA) offices, with the exception of the Office of Inspector General and the Board of Contract Appeals.
- 3. Cancellation. ADM P 5420.40D CHGE1.
- 4. Background.
- a. <u>ADM P 5420.40D CHGE 1</u> provided instructions and guidelines for the establishment, management, and termination of committees regardless of whether the committees were designated as interagency, intra-GSA, or committees that fall under the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App.
- b. This policy pertains only to the management of committees that fall under the provisions of FACA and provides instruction and guidance for managing these committees.
- c. For instructions and guidelines pertaining to the management of non-FACA committees (interagency or intra-GSA committees), refer to OAS 5420.1 Intergovernmental, Intragovernmental GSA and Extra-governmental Committees.

Signature.

DENISE TURNER ROTH

Administrator

# FEDERAL ADVISORY COMMITTEE ACT (FACA) MANAGEMENT TRAINING COURSE

### Course Agenda June 5-6, 2017

### Monday, June 5th

8:30 – 8:45am	Introductions/Objectives/Announcements General Services Administration— Virginia Wills
8:45 – 10:00am	Federal Advisory Committee Act Overview General Services Administration – Lori Kowalski
10:00-10:15am	Break
10:15-11:45	Legal Framework for Advisory Committees Small Business Administration – Larry Webb
11:45 – 1:00	Lunch
1:00- 2:30	Ethics, Conflict of Interest, and Financial Disclosure Office of Government Ethics – Vince Salamone
2:30 – 2:45	Break
2:45 – 4:00	The Importance of FACA Recordkeeping National Archives and Records Administration – Laura McHale
4:00 – 4:15	Questions, Wrap up for the Day General Services Administration – Virginia Wills

# FEDERAL ADVISORY COMMITTEE ACT (FACA) MANAGEMENT TRAINING COURSE

### Course Agenda - June 5-6, 2017

#### Tuesday, June 6th

8:30 – 9:45am The Role and Responsibilities of the

Committee Management Officer
Department of Veterans Affairs -

Jeffery Moragne

9:45 – 10:00am Break

10:00 – 11:45am The Role and Responsibilities of the

**Designated Federal Officer** 

General Services Administration -

Stephanie Sanzone

11:45-12:45pm Lunch

12:45 – 1:45pm Panel: Other FACA Perspectives

(1) Library of Congress

(Govt Pubs and Periodicals Sec)

(2) Committee Chair/Member Perspective

1:45 – 2:00pm Break

2:00 – 2:30pm Multi-Purpose FACA Database

General Services Administration -

Virginia Wills

2:30 – 2:45pm Wrap Up/Final Thoughts/Evaluations

General Services Administration -

Virginia Wills

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC	PRIVACY	INFORMA	TION	CENTER

Plaintiff,

V.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; KRIS KOBACH, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES; OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES; GENERAL SERVICES ADMINISTRATION

Civil Action No.	

Defendants.

#### PLAINTIFF'S EMEREGNCY MOTION FOR A TEMPORARY RESTRAINING ORDER

Pursuant to Rules 7 and 65 of the Federal Rules of Civil Procedure and Local Civil Rule 65.1, Plaintiff Electronic Privacy Information Center ("EPIC") hereby moves this Court for a Temporary Restraining Order prohibiting Defendants from collecting voter roll data from state election officials prior to the completion and public release of a required Privacy Impact Assessment, E-Government Act of 2002, Pub. L. 107–347, 116 Stat. 2899 (codified as amended at 44 U.S.C. § 3501 note), and prior to the resolution of EPIC's constitutional privacy claims.

The collection and aggregation of state voter roll data by a federal commission is without precedent. The Commission's pending action would increase the risks to the privacy of millions of registered voters—including in particular military families whose home addresses would be revealed—and would undermine the integrity of the federal election system. Further, the request

for partial Social Security Numbers that are often used as default passwords for commercial

services, coupled with the Commission's plan to make such information "publicly available," is

both without precedent and crazy.

The Commission's failure to fulfill its statutory obligation to undertake a Privacy Impact

Assessment prior to sending requests to state election officials underscores the urgent need for

relief. EPIC accordingly requests, as an immediate remedy, that the Court safeguard the privacy

interests of registered voters and maintain the status quo while more permanent solutions may be

considered. EPIC also requests that the Court set an expedited hearing to determine whether such

order should remain in place.

This motion is supported by the attached Memorandum in Support of Plaintiff's

Emergency Motion for a Temporary Restraining Order, accompanying declarations, exhibits,

and any additional submissions that may be considered by the Court.

Respectfully Submitted,

/s/ Marc Rotenberg

Marc Rotenberg, D.C. Bar # 422825

**EPIC President and Executive Director** 

Alan Butler, D.C. Bar # 1012128

**EPIC Senior Counsel** 

ELECTRONIC PRIVACY

INFORMATION CENTER

1718 Connecticut Avenue, N.W.

Suite 200

Washington, D.C. 20009

(202) 483-1140 (telephone)

(202) 483-1248 (facsimile)

Dated: July 3, 2017

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# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER	
Plaintiff,	
V.	
PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his	Civil Action No.
official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; KRIS KOBACH, in his	
official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; EXECUTIVE OFFICE	
OF THE PRESIDENT OF THE UNITED STATES; OFFICE OF THE VICE PRESIDENT OF THE UNITED	
STATES; GENERAL SERVICES ADMINISTRATION	
Defendants.	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER

#### INTRODUCTION

The failure to safeguard personal data gathered by government agencies is a national crisis. In 2015, the personal records of 22 million Americans, including 5 million digitized fingerprints and sensitive background records, were breached. Federal agencies are, understandably, required to take steps to safeguard personal information before collecting new data. Yet the Presidential Advisory Commission on Election Integrity ("PACEI" or the "Commission") has initiated an unprecedented effort to collect millions of state voter records without any effort to protect the privacy interests of those voters. More than two dozen states have already refused to comply. The action is as brazen as it is unlawful.

The Commission has ignored entirely the rules Congress established in the E-Government Act of 2002 and the Federal Advisory Committee Act that would safeguard the personal data sought by the Commission. The Commission was required to prepare and publish a Privacy Impact Assessment that would have addressed the types of information to be collected and the purpose of the collection, as well as how the information would be secured and whether it would be disclosed to others. The Commission's actions also threaten the informational privacy rights guaranteed under the Fifth Amendment and violate the Due Process Clause.

The Commission has already committed two egregious acts: (1) directing state election officials to transmit state voter records to an insecure website and (2) announcing that it will make publicly available the last four digits of the Social Security Numbers of millions of registered voters. Those four numbers are the default passwords for many commercial services and could lead almost immediately to an increase in financial fraud and identity theft.

Registered voters, EPIC, and EPIC's members face immediate and irreparable injury as a result of these violations of law.

EPIC respectfully asks this Court to enter a temporary restraining order prohibiting the Commission from collecting any voter data. The requirements for such an order have been met: EPIC is likely to succeed on the merits of its claim that the collection is unlawful. EPIC's members will be irreparably harmed by the collection of their personal information by the Commission without adequate safeguards. The Commission has not identified any interest that would outweigh those harms, and the public interest clearly favors preserving the status quo pending proper review and the establishment of voter privacy safeguards.

#### FACTUAL BACKGROUND

#### A. The Privacy Threat of Massive Voter Databases

Computer experts have long raised concerns about the collection of sensitive voter information in insecure databases. *E.g.*, Barbara Simons, *Voter Registration and Privacy* (2005);<sup>1</sup> EPIC, Comment Letter on U.S. Election Assistance Commission Proposed Information Collection Activity (Feb. 25, 2005).<sup>2</sup> Election officials "face many technical challenges in implementing [voter registration] databases in a secure, accurate, and reliable manner, while protecting sensitive information and minimizing the risk of identity theft." Simons, *supra*, at 10. Voter registration databases "are complex systems," and "[i]t is likely that one or more aspects of the technology will fail at some point." Ass'n for Comput. Machinery, *Statewide Databases of Registered Voters: Study of Accuracy, Privacy, Usability, Security, and Reliability Issues* 6 (Feb. 2006).<sup>3</sup> Moreover, merging data from multiple sources "can, if not properly handled, undermine the accuracy of the voter registration data." Simons, *supra*, at 12.

Recent events underscore the privacy risks inherent in assembling a nationwide voter database. In June 2017, political consulting firm Deep Root Analytics was found to have left

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<sup>&</sup>lt;sup>1</sup> https://epic.org/events/id/resources/simons.ppt.

<sup>&</sup>lt;sup>2</sup> https://epic.org/privacy/voting/register/eac\_comments\_022505.html.

https://people.eecs.berkeley.edu/~daw/papers/vrd-acm06.pdf.

198,000,000 voter files unprotected on the Internet for weeks. Brian Fung et al., *A Republican Contractor's Database of Nearly Every Voter Was Left Exposed on the Internet for 12 Days, Researcher Says*, Wash. Post (June 19, 2017). The files included "billions of data points" such as names, addresses, birth dates, phone numbers, and voting histories. *Id.* The researcher who discovered the cache described the alarming implications of exposing such a large accumulation of voter information to the public: "With this data you can target neighborhoods, individuals, people of all sorts of persuasions . . . . I could give you the home address of every person the RNC believes voted for Trump." *Id.* 

#### **B.** The Establishment of the Commission

The Presidential Advisory Commission on Election Integrity was established by executive order on May 11, 2017. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017), Ex. 1. The Vice President is named as the Chair of the Commission, "which shall be composed [sic] of not more than 15 additional members." *Id.* Additional members are appointed by the President, and the Vice President may select a Vice Chair of the Commission from among the members. *Id.* Vice President Pence has named Kansas Secretary of State Kris Kobach to serve as Vice Chair of the Commission.

The Commission was asked to "*study* the registration and voting processes used in Federal elections." *Id.* (emphasis added). The Commission was further asked to identify "(a) those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections; (b) those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections; and (c) those vulnerabilities in

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<sup>&</sup>lt;sup>4</sup> https://www.washingtonpost.com/news/the-switch/wp/2017/06/19/republican-contractor-database-every-voter-exposed-internet-12-days-researcher-says/.

voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting." *Id*.

There is no authority in the Executive Order to subpoena records, to undertake investigations, or to demand the production of state voter records from state election officials.

#### C. The Commission's Request/Demand for State Voter Records

On June 28, 2017, the Vice Chair of the Commission undertook to collect detailed voter histories from all fifty states and the District of Columbia. Such a request to state election officials had never been made by any federal official before. The Vice Chair stated during a phone call with PACEI members that "a letter w[ould] be sent today to the 50 states and District of Columbia on behalf of the Commission requesting publicly-available data from state voter rolls . . . ." Ex. 2. One of these letters, dated June 28, 2017, was sent to North Carolina Secretary of State Elaine Marshall. Letter from Kris Kobach, Vice Chair, PACEI, to Elaine Marshall, Secretary of State, North Carolina (June 28, 2017), Ex. 3 ("Commission Letter"). In the letter, Kobach asked Marshall to provide to the Commission

the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.

*Id.* at 1–2.

The Commission sought from the states sensitive personal information. For example, the improper collection of Social Security Numbers ("SSNs") is a major contributor to identity theft in the United States. Soc. Sec. Admin., *Identity Theft and Your Social Security Number* (Feb.

2016).<sup>5</sup> "An estimated 17.6 million Americans—about 7% of U.S. residents age 16 or older—were victims of identity theft in 2014." Erika Harrell, Bureau of Justice Statistics, *Victims of Identity Theft, 2014* at 1 (Sept. 2015). U.S. victims of identity theft lost a collective total of \$15.4 billion in the same year. *Id.* at 7.

Collecting and publishing the home addresses of current and former military personnel also poses privacy and security risks. The U.S. Military routinely redacts "names, social security numbers, personal telephone numbers, home addresses and personal email addresses" of military personnel in published documents, "since release would constitute a clearly unwarranted invasion of their personal privacy." U.S. Pacific Fleet, *Report of the Court of Inquiry* (2001);<sup>7</sup> see also Def. Logistics Agency, *Defense Logistics Agency Instruction 6303* at 9, 14 (2009)<sup>8</sup> (noting that military home addresses are "For Official Use Only" and must be redacted prior to public release of documents); Jason Molinet, *ISIS hackers call for homegrown 'jihad' against U.S. military, posts names and addresses of 100 service members*, N.Y. Daily News (Mar. 21, 2015).<sup>9</sup>

In the Commission Letter, the Vice Chair warned that "any documents that are submitted to the full Commission w[ould] also be made available to the public." Commission Letter 2. The Vice Chair expected a response from the states by July 14, 2017—approximately ten business days after the date of the request—and instructed that the State Secretary could submit her responses "electronically to ElectionIntegrityStaff@ovp.eop.gov or by utilizing the Safe Access File Exchange" system. *Id.* Neither the email address nor the file exchange system proposed by

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<sup>&</sup>lt;sup>5</sup> https://www.ssa.gov/pubs/EN-05-10064.pdf.

<sup>6</sup> https://www.bjs.gov/content/pub/pdf/vit14.pdf.

<sup>&</sup>lt;sup>7</sup> http://www.cpf.navy.mil/subsite/ehimemaru/legal/GREENEVILLE\_FOIA\_exemption.pdf.

<sup>8</sup> http://www.dla.mil/Portals/104/Documents/J5StrategicPlansPolicy/PublicIssuances/i6303.pdf.

<sup>&</sup>lt;sup>9</sup> http://www.nydailynews.com/news/national/isis-hackers-call-jihad-u-s-military-article-1.2157749.

the Commission provides a secure mechanism for transferring sensitive personal information. In fact, an attempt to access the File Exchange system linked in the letter leads to a warning screen with a notification that the site is insecure. *See* Screenshot: Google Chrome Security Warning for Safe Access File Exchange ("SAFE") Site (July 3, 2017 12:02 AM), Ex. 6.

Similar letters were sent to election officials in the other 49 states and the District of Columbia.

#### D. The States Have Opposed the Commission's Request

Officials in at least two dozen states have partially or fully refused to comply with the Commission Letter. Philip Bump & Christopher Ingraham, *Trump Says States Are 'Trying to Hide' Things from His Voter Fraud Commission. Here's What They Actually Say*, Wash. Post (July 1, 2017). California Secretary of State Alex Padilla stated on June 29, 2017, that he would "not provide sensitive voter information to a committee that has already inaccurately passed judgment that millions of Californians voted illegally. California's participation would only serve to legitimize the false and already debunked claims of massive voter fraud." Press Release, Secretary of State Alex Padilla Responds to Presidential Election Commission Request for Personal Data of California Voters (June 29, 2017). Kentucky Secretary of State Alison Lundergan Grimes stated on June 29, 2017, that "Kentucky w[ould] not aid a commission that is at best a waste of taxpayer money and at worst an attempt to legitimize voter suppression efforts across the country." Bradford Queen, Secretary Grimes Statement on Presidential Election

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<sup>&</sup>lt;sup>10</sup> https://www.washingtonpost.com/news/wonk/wp/2017/07/01/trump-says-states-are-trying-to-hide-things-from-his-voter-fraud-commission-heres-what-they-actually-say/.

<sup>&</sup>lt;sup>11</sup> http://www.sos.ca.gov/administration/news-releases-and-advisories/2017-news-releases-and-advisories/secretary-state-alex-padilla-responds-presidential-election-commission-request-personal-data-california-voters/.

Commission's Request for Voters' Personal Information, Kentucky (last accessed July 3, 2017).<sup>12</sup> Virginia Governor Terry McAuliffe stated on June 29, 2017, that he had "no intention of honoring [Kobach's] request." Terry McAuliffe, *Governor McAuliffe Statement on Request from Trump Elections Commission* (June 29, 2017).<sup>13</sup>

#### E. The Commission's Failure to Conduct a Privacy Impact Assessment

Under the E-Government Act of 2002, any agency "initiating a new collection of information that (I) will be collected, maintained, or disseminated using information technology; and (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual" is required to complete a privacy impact assessment ("PIA") before initiating such collection. Pub. L. 107–347, 116 Stat. 2899 (codified as amended at 44 U.S.C. § 3501 note). The agency must:

(i) [C]onduct a privacy impact assessment; (ii) ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and (iii) if practicable, after completion of the review under clause (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means.

#### *Id.* Under the Federal Advisory Committee Act:

[R]ecords, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. app. 2 § 10(b). The Commission has not conducted a privacy impact assessment for its collection of state voter data. The Commission has not ensured review of a PIA by any Chief

https://governor.virginia.gov/newsroom/newsarticle?articleId=20595.

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<sup>12</sup> http://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=129.

Information Officer or equivalent official. The Commission has not made such a PIA available to the public. Complaint  $\P 32-34$ .

#### STANDARD OF REVIEW

In order to obtain a temporary restraining order or preliminary injunction, a plaintiff must show that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of the equities tips in their favor, and (4) that an injunction is in the public interest. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). Both temporary restraining orders and preliminary injunctions are extraordinary remedies that "should be granted only when the party seeking relief, by a clear showing, carries the burden of persuasion." *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 120 (D.D.C. 2013). The D.C. Circuit has adopted a "sliding scale" approach when evaluating these injunction factors. *Sherley*, 644 F.3d at 392. Thus if the "movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make a strong showing on another factor." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009). *But see League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016) (noting that the court has "not yet decided" whether the sliding scale approach applies post-*Winter*).

#### **ARGUMENT**

This case presents the type of extraordinary circumstance that justifies a temporary restraining order. Absent a prohibition from this Court, the Commission will begin collecting and aggregating the sensitive, personal information of voters across the country in less than two weeks without any procedures in place to protect voter privacy or the security and integrity of the state voter data. There is already evidence in the record that the Commission has placed and will place voter data at risk.

First and foremost, this proposed collection violates a core provision of the E-Government Act of 2002, which requires that agencies establish sufficient protections *prior* to initiating any new collection of personal information using information technology. The Commission's actions also violate voters' Fifth Amendment right to informational privacy and, through their implementation, violate the Administrative Procedure Act (APA). Second, this collection and aggregation of sensitive personal information, as well as the exposure of this voter data through insecure systems with no protections in place, will cause irreparable harm to EPIC's members. Once data has been leaked, there is no way to control its spread. With a data breach, there is literally no way to repair the damage, once done. Third, the balance of the equities tips in EPIC's favor because the Commission will suffer no hardship if the collection is enjoined pending the completion of a privacy assessment as required under federal law. The Commission's mandate is to "study" election integrity. It has no authority to investigate or to gather state voter records. There is nothing that would justify the immediate collection of this voter data. Indeed, it is in the public interest to prevent any disruption or interference with states' voter registration systems. The integrity of state voting systems is of paramount importance and should not be put at risk at the whim of the Commission members.

#### A. EPIC is likely to succeed on the merits of its claims.

#### 1. The collection of state voter data violates the E-Government Act and the APA

The Commission has made no attempt to comply with the Privacy Impact Assessment requirements of Section 208 of the E-Government Act of 2002, Pub. L. 107-347, 115 Stat. 2899, Title II § 208 (codified at 44 U.S.C. § 3501 note), which are clearly applicable to the collection of sensitive, personal information from state voter databases. The Commission's actions therefore violate the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A). EPIC is likely to succeed on its statutory claims.

As the Department of Justice has explained, "Privacy Impact Assessments ("PIAs") are required by Section 208 of the E-Government Act for all Federal government agencies that develop or procure new information technology involving the collection, maintenance, or dissemination of information in identifiable form or that make substantial changes to existing information technology that manages information in identifiable form." Office of Privacy & Civil Liberties, U.S. Dep't of Justice, *E-Government Act of 2002* (June 18, 2014). A Privacy Impact Assessment is "an analysis of how information is handled: (i) to ensure handling conforms to applicable legal, regulatory, and policy requirements regarding privacy, (ii) to determine the risks and effects of collecting, maintaining and disseminating information in identifiable form in an electronic information system, and (iii) to examine and evaluate protections and alternative processes for handling information to mitigate potential privacy risks." Joshua B. Bolten, Director, Office of Mgmt. & Budget, Executive Office of the President, M-03-22, Memorandum for Heads of Executive Departments and Agencies, Attachment A (Sept. 26, 2003) [hereinafter Bolten Memo], Ex. 5.

The E-Government Act requires that an agency "shall take actions described under subparagraph (B)" of Section 208 "before . . . initiating a new collection of information that—(I) will be collected, maintained, or disseminated using information technology; and (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual, if identical questions have been posed to, or identical reporting requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the Federal Government." E-Government Act § 208(b)(1)(A)(ii). The actions described in subparagraph (B), which the Commission must take *before* collecting this information, include "(i) conduct[ing] a privacy assessment; (ii) ensur[ing] the review of the privacy impact assessment by the Chief

<sup>&</sup>lt;sup>14</sup> https://www.justice.gov/opcl/e-government-act-2002.

Information Officer, or equivalent official, as determined by the head of the agency; and (iii) if practicable, after completion of the review under clause (ii), mak[ing] the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means." E-Government Act § 208(b)(1)(B).

The Commission has already "initiated a new collection" of personal information, but it has not complied with any of these requirements. The APA prohibits federal agencies from taking any action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The Commission's actions are "not in accordance with law." The APA authorizes this Court to "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). Such a claim may proceed "where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Norton v. S. Utah Wildlife Alliance, 542 U.S. 55, 64 (2004). An agency's failure to comply with the PIA requirements of the E-Government Act is reviewable under both provisions of APA § 706. Fanin v. Dep't of Veteran Affairs, 572 F.3d 868, 875 (11th Cir. 2009).

The E-Government Act defines "information technology" as "any equipment or interconnected system . . . used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly . . . ." 40 U.S.C. § 11101(6); see 44 U.S.C. § 3501 note, § 201 (applying definitions from 44 U.S.C. § 3502, 3601); 44 US.C. § 3502(9) (applying the definition of 40 U.S.C. § 11101(6)). Courts have found that a "minor change" to "a system or collection" that does not "create new privacy risks," such as the purchasing of a new external hard drive, would not require a PIA. *Perkins v. Dep't of Veteran Affairs*, No. 07-310, at \*19

(N.D. Ala. Apr. 21, 2010) (quoting Bolten Memo § II.B.3.f). However, an agency is obligated to conduct a PIA before initiating a new collection of data that will be "collected, maintained, or disseminated using information technology" whenever that data "includes any information in identifiable form permitting the physical or online contacting of a specific individual" and so long as the questions have been posed to 10 or more persons. E-Government Act § 208(b)(1)(A)(ii). The term "identifiable form" means "any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means." E-Government Act § 208(d).

There is no question that the PIA requirement applies in this case. The Commission's decision to initiate collection of comprehensive voter data by requesting personal information from Secretaries of State of all 50 states and the District of Columbia, including sensitive, personal information about hundreds of millions of voters, triggers the obligations of § 208(b)(1)(A)(ii) of the E-Government Act. The letter sent by Commission Vice Chair Kobach requests that the Secretary of State provide "voter roll data" including "the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas information." Commission Letter 1–2. The states are instructed to submit their "responses *electronically* to ElectionIntegrityStaff@ovp.eop.gov or by utilizing the Safe Access File Exchange ("SAFE")," a government website used to transfer files. *Id.* (emphasis added).<sup>15</sup> This sensitive voter roll data is

<sup>&</sup>lt;sup>15</sup> The government file exchange website is not actually "safe." In fact, any user who follows the link provided in the Commission Letter will see a warning that the site is insecure. Ex 6.

precisely the type of "personal information" in "identifiable form" that the PIA provision was intended to protect, and the transfer of large data files via email or otherwise clearly involves the use of information technology.

As the court explained in *Perkins*, PIAs are necessary to address "(1) what information is collected and why, (2) the agency's intended use of the information, (3) with whom the information would be shared, (4) what opportunities the [individuals] would have to decline to provide information or to decline to share the information, (5) how the information would be secured, and (6) whether a system of records is being created." *Id. See* E-Government Act § 208(b)(2)(B); Bolten Memo § II.C.1.a. These types of inquiries are "certainly appropriate and required" when an agency "initially created" a new database system and "began collecting data." *Perkins*, No. 07-310, at \*19–20.

The APA defines "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," but excludes from the definition 8 specific types of entities not relevant to this case. 5 U.S.C. § 701(b). The E-Government definition provided in 44 U.S.C. § 3502, E-Government Act § 201, is even broader than the APA definition and includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include (A) the Government Accountability Office; (B) Federal Election Commission; (C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or (D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities." Under both definitions, the Commission is an

"agency" and was therefore required to conduct a PIA prior to initiating the collection of voter data.

## 2. The publication of voters' personal information violates the constitutional right to informational privacy

The Supreme Court has long recognized that individuals have a constitutionally protected interest in "avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *accord Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977). The constitutionality of a "government action that encroaches upon the privacy rights of an individual is determined by balancing the nature and extent of the intrusion against the government's interest in obtaining the information it seeks." *United States v. District of Columbia*, 44 F. Supp. 2d 53, 60–61 (D.D.C. 1999). The "individual interest in protecting the privacy of information sought by the government" is more important when that information is to be "disseminated publicly." *Am. Fed'n of Gov't Emps., AFL-CIO v. HUD*, 118 F.3d 786, 793 (D.C. Cir. 1997) [hereinafter *AFGE v. HUD*] (assuming without concluding that the right exists).

The Government has previously survived right to informational privacy challenges where it implemented measures to protect the confidentiality and security of the personal information that it was collecting or there was a federal law that provided substantial protection. *See id.* (upholding collection of personal information by HUD on the SF 85P form); *NASA v. Nelson*, 562 U.S. 134, 156 (2011). But when no such safeguards exist, when the Government has not "evidence a proper concern" for individual privacy, the individual's interest in prohibiting the collection of their information by an agency is strongest. *NASA*, 562 U.S. at 156. That is especially true when the data includes identifying and sensitive information such as addresses, date of birth, SSNs, and political affiliations.

The Commission has taken no steps to protect this sensitive personal information that they are seeking to collect. Instead, they have disclaimed all responsibility for maintaining the security and confidentiality of these records. In the letter to Secretaries of State, Vice Chair Kobach tells the states to "be aware that any documents that are submitted to the full Commission will also be made available to the public." Commission Letter 2. The Commission has provided no justification for such broad collection and disclosure of voters' personal information. In the letter, the Vice Chair claims, without any supporting evidence, that the data will be used to "analyze vulnerabilities and issues related to voter registration and voting." Commission Letter 1. But the Office of the Vice President and the Commission have no authority to oversee state voter registration, and the Executive Order makes clear that the purpose of the Commission is to "study" election integrity.

Informational privacy claims merit heightened scrutiny. See, e.g., Eisenbud v. Suffolk

County, 841 F.2d 42, 45 (2d Cir. 1988); Fraternal Order of Police, Lodge 5, v. City of

Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987). This requires a "delicate task of

weighing competing interests," United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578

(3d Cir. 1980). See Doe v. Attorney General, 941 F.2d 780 (9th Cir. 1991). In order to overcome
the constitutional obligation to protect personal information from disclosure, the government
must demonstrate "sufficiently weighty interests in obtaining the information sought" and

"justify the intrusions into the individuals' privacy." AFGE v. HUD, 118 F.3d at 793. The

Commission has not identified any legitimate interests that would justify such a sweeping and
unprecedented public disclosure of voter records.

#### B. EPIC's members will suffer irreparable harm if relief is not granted.

If the Court does not enjoin the Commission's unlawful collection, aggregation, and public disclosure of voter data, EPIC's members will be irreparably harmed. Individual voter

data is not broadly available to the public; otherwise there would be no need for the Commission to request it from the states. These records are collected by the states for a specific purpose—voter registration—and voters have not authorized its dissemination to or by the Commission for an entirely different, and undisclosed, purpose. The unauthorized disclosure of this sensitive personal information would cause immeasurable harm that would be impossible to repair because once this data is publicly available there is no way to control its spread or use.

A violation of the constitutional right to informational privacy, alone, is sufficient to satisfy the irreparable harm test. *Fort Wayne Women's Health v. Bd. of Comm'rs, Allen County, Ind.*, 735 F. Supp. 2d 1045, 1061 (N.D. Ind. 2010). *See Am. Fed'n of Gov't Emps., AFL-CIO v. Sullivan*, 744 F. Supp. 294, 298 (D.D.C. 1990). But the disclosure of personal identifying information itself also gives rise to an irreparable injury. *Does v. Univ. of Wash.*, No. 16-1212, 2016 WL 4147307, *slip op.* at \*2 (W.D. Wash. Aug. 3, 2016). "In the age of the internet, when information is made public quickly and without borders, it is nearly impossible to contain an impermissible disclosure after the fact, as information can live on in perpetuity in the ether to be shared for any number of deviant purposes." *Wilcox v. Bastiste*, No. 17-122, 2017 WL 2525309, *slip op.* at \*3 (E.D. Wash. June 9, 2017); *see also Pacific Radiation Oncology, LLC v. Queen's Medical Center*, 47 F. Supp. 3d 1069, 1076 (D. Haw. 2014) (noting that it is "beyond dispute that the public disclosure of that information" in medical files would subject patients "to potential irreparable harm").

Even the mere collection and aggregation of the state voter data would cause an irreparable harm to EPIC's members because the Commission has refused to adopt measures to ensure the privacy and security of that data as required by law. Instead, the Commission has encouraged the states to use insecure tools to transfer voters' sensitive personal information. The

Commission has also failed to assess or disclose how the data will be handled and secured once it is collected. Given the recent history of data breaches in federal government systems that house sensitive information, the lack of planning and foresight on the part of the Commission poses an immediate and inexcusable risk to the privacy of all voters.

#### C. The balance of the equities and public interest favor relief.

The balance of the equities and public interest factors favor entry of the temporary restraining order that EPIC seeks. This purpose of temporary relief is to preserve, not "upend the status quo." *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 43 (2008). Preserving the status quo is the purpose of EPIC's motion. Currently there is no single federal database that houses state voter roll data. The Commission now seeks in an unprecedented shift to change that fact without prior review of the privacy implications as required by law. The public interest and balance of the equities favor EPIC's request to preserve the status quo pending review by this Court.

There are no countervailing interests that weigh against the relief EPIC seeks. The Commission would not be harmed by a temporary halt to its plans, as it has no valid interest in violating the PIA requirements in the E-Government Act. "There is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d at 12 (citing *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511-12 (D.C. Cir. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). In fact, "there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id.* at 12.

The Commission's actions cut directly against the stated mission to "identif[y] areas of opportunity to increase the integrity of our election systems." Commission Letter 2. By collecting and aggregating detailed, sensitive personal voter information without first conducting

a PIA, the Commission is threatening the security and integrity of the entire voting system. This

action will not only put voter data at risk; it will risk disincentivizing voters in a way similar to

the restrictive documentation requirements in League of Women Voters. The court the found that

the requirement to reveal "sensitive citizenship documents" in order to register to vote caused the

voter registration numbers to "plummet[]" and found that there was a strong public interest in

favor of enjoining the change. League of Women Voters, 838 F.3d at 4, 9, 13. The right to vote is

"preservative of all rights" and of "most fundamental significance under our constitutional

structure." Id. at 12. The Commission has not provided any evidence that the collection and

aggregation of sensitive voter data would "increase the integrity of our election systems." More

likely, it will have the opposite effect.

**CONCLUSION** 

The Emergency Motion for a Temporary Restraining Order should be granted, and

Defendants should be restrained from collecting state voter data prior to the completion of a

Privacy Impact Assessment.

Respectfully Submitted,

/s/ Marc Rotenberg

Marc Rotenberg, D.C. Bar # 422825

**EPIC President and Executive Director** 

Alan Butler, D.C. Bar # 1012128

**EPIC Senior Counsel** 

**ELECTRONIC PRIVACY** 

INFORMATION CENTER

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Suite 200

Washington, D.C. 20009

(202) 483-1140 (telephone)

(202) 483-1248 (facsimile)

Dated: July 3, 2017

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### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER	
Plaintiff,	
V.	
PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his	Civil Action No.
official capacity as Vice Chair of the Presidential Advisory	
Commission on Election Integrity; KRIS KOBACH, in his	
official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; EXECUTIVE OFFICE	
OF THE PRESIDENT OF THE UNITED STATES;	
OFFICE OF THE VICE PRESIDENT OF THE UNITED	
STATES; GENERAL SERVICES ADMINISTRATION	
Defendants.	

## AFFIRMATION OF MARC ROTENBERG IN SUPPORT OF THE PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER

MARC ROTENBERG, an attorney admitted to practice before this Court, affirms the following to be true under the penalties of perjury:

- 1. I am the President and Executive Director of the Electronic Privacy Information Center ("EPIC") and counsel for EPIC in the above-captioned member. I submit this affirmation in support of the plaintiff's motion for a temporary restraining order in the above-captioned matter.
- 2. Annexed hereto as Exhibit 1 is a true and correct copy of Executive Order No. 13,799, 82 Fed. Reg. 22,389, issued by President Donald Trump on May 11, 2017.
- 3. Annexed hereto as Exhibit 2 is a true and correct copy of "Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity," a press release issued by the Office of the Vice President on June 28, 2017.

4. Annexed hereto as Exhibit 3 is a true and correct copy of a letter sent by Kris Kobach,

Vice Chair of the Presidential Advisory Commission on Election Integrity, to Elaine Marshall,

North Carolina Secretary of State, on June 28, 2017.

5. Annexed hereto as Exhibit 4 is a true and correct copy of a memorandum opinion issued

by the U.S. District Court for the Northern District of Alabama in *Perkins v. Dep't of Veteran* 

Affairs, No. 07-310, on April 21, 2010.

6. Annexed hereto as Exhibit 5 is a true and correct copy of M-03-22, a memorandum

issued by Josh Bolten, Director of the Office of Management and Budget, to the heads of

executive departments and agencies on September 23, 2003.

7. Annexed hereto as Exhibit 6 is a true and correct copy of a screenshot of a Google

Chrome security warning for the Secure Access File Exchange ("SAFE") website, captured on

July 3, 2017 at 12:02 AM.

Respectfully Submitted,

/s/ Marc Rotenberg

Marc Rotenberg, D.C. Bar # 422825

**EPIC President and Executive Director** 

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Dated: July 3, 2017

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#### LIST OF EXHIBITS

Exhibit 1	Exec. Order. No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017)
Exhibit 2	Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017)
Exhibit 3	Letter from Kris Kobach, Vice Chair, Presidential Advisory Commission on Election Integrity, to Elaine Marshall, Secretary of State, North Carolina (June 28, 2017)
Exhibit 4	Perkins v. Dep't of Veteran Affairs, No. 07-310 (N.D. Ala. Apr. 21, 2010)
Exhibit 5	Memorandum M-03-22 from Josh Bolten, Dir. of Office of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies (Sep. 23, 2003)
Exhibit 6	Screenshot: Google Chrome Security Warning for Safe Access File Exchange ("SAFE") Website (July 3, 2017 12:02 AM)

# Exhibit 1



#### Federal Register

Vol. 82, No. 93

Tuesday, May 16, 2017

#### **Presidential Documents**

#### Title 3—

#### The President

Executive Order 13799 of May 11, 2017

## **Establishment of Presidential Advisory Commission on Election Integrity**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote fair and honest Federal elections, it is hereby ordered as follows:

**Section 1.** *Establishment*. The Presidential Advisory Commission on Election Integrity (Commission) is hereby established.

- **Sec. 2.** *Membership.* The Vice President shall chair the Commission, which shall be composed of not more than 15 additional members. The President shall appoint the additional members, who shall include individuals with knowledge and experience in elections, election management, election fraud detection, and voter integrity efforts, and any other individuals with knowledge or experience that the President determines to be of value to the Commission. The Vice President may select a Vice Chair of the Commission from among the members appointed by the President.
- **Sec. 3.** *Mission*. The Commission shall, consistent with applicable law, study the registration and voting processes used in Federal elections. The Commission shall be solely advisory and shall submit a report to the President that identifies the following:
- (a) those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections;
- (b) those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections; and
- (c) those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting.
- **Sec. 4**. *Definitions*. For purposes of this order:
- (a) The term "improper voter registration" means any situation where an individual who does not possess the legal right to vote in a jurisdiction is included as an eligible voter on that jurisdiction's voter list, regardless of the state of mind or intent of such individual.
- (b) The term "improper voting" means the act of an individual casting a non-provisional ballot in a jurisdiction in which that individual is ineligible to vote, or the act of an individual casting a ballot in multiple jurisdictions, regardless of the state of mind or intent of that individual.
- (c) The term "fraudulent voter registration" means any situation where an individual knowingly and intentionally takes steps to add ineligible individuals to voter lists.
- (d) The term "fraudulent voting" means the act of casting a non-provisional ballot or multiple ballots with knowledge that casting the ballot or ballots is illegal.
- **Sec. 5.** Administration. The Commission shall hold public meetings and engage with Federal, State, and local officials, and election law experts, as necessary, to carry out its mission. The Commission shall be informed by, and shall strive to avoid duplicating, the efforts of existing government entities. The Commission shall have staff to provide support for its functions.

- **Sec. 6**. *Termination*. The Commission shall terminate 30 days after it submits its report to the President.
- **Sec. 7.** *General Provisions.* (a) To the extent permitted by law, and subject to the availability of appropriations, the General Services Administration shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission on a reimbursable basis.
- (b) Relevant executive departments and agencies shall endeavor to cooperate with the Commission.
- (c) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (the "Act"), may apply to the Commission, any functions of the President under that Act, except for those in section 6 of the Act, shall be performed by the Administrator of General Services.
- (d) Members of the Commission shall serve without any additional compensation for their work on the Commission, but shall be allowed travel expenses, including per diem in lieu of subsistence, to the extent permitted by law for persons serving intermittently in the Government service (5 U.S.C. 5701–5707).
  - (e) Nothing in this order shall be construed to impair or otherwise affect:
  - (i) the authority granted by law to an executive department or agency, or the head thereof; or
  - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (f) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (g) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sundsamm

THE WHITE HOUSE, May 11, 2017.

## Exhibit 2

the WHITE HOUSE





#### From the Press Office

Speeches & Remarks

Press Briefings

#### **Statements & Releases**

Nominations & Appointments

**Presidential Actions** 

Legislation

**Disclosures** 

#### The White House

Office of the Vice President

For Immediate Release

June 28, 2017

# Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity

This morning, Vice President Mike Pence held an organizational call with members of the Presidential Advisory Commission on Election Integrity. The Vice President reiterated President Trump's charge to the commission with producing a set of recommendations to increase the American people's confidence in the integrity of our election systems.

"The integrity of the vote is a foundation of our democracy; this bipartisan commission will review ways to strengthen that integrity in order to protect and preserve the principle of one person, one vote," the Vice President told commission members today.

The commission set July 19 as its first meeting, which will take place in Washington, D.C.

Vice Chair of the Commission and Kansas Secretary of State Kris Kobach told members a letter will be sent today to the 50 states and District of Columbia on behalf of the Commission requesting publicly-available data from state voter rolls and feedback on how to improve election integrity.



HOME BRIEFING ROOM ISSUES THE ADMINISTRATION PARTICIPATE 1600 PENN

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# Exhibit 3

#### **Presidential Advisory Commission on Election Integrity**

June 28, 2017

The Honorable Elaine Marshall Secretary of State PO Box 29622 Raleigh, NC 27626-0622

Dear Secretary Marshall,

I serve as the Vice Chair for the Presidential Advisory Commission on Election Integrity ("Commission"), which was formed pursuant to Executive Order 13799 of May 11, 2017. The Commission is charged with studying the registration and voting processes used in federal elections and submitting a report to the President of the United States that identifies laws, rules, policies, activities, strategies, and practices that enhance or undermine the American people's confidence in the integrity of federal elections processes.

As the Commission begins it work, I invite you to contribute your views and recommendations throughout this process. In particular:

- 1. What changes, if any, to federal election laws would you recommend to enhance the integrity of federal elections?
- 2. How can the Commission support state and local election administrators with regard to information technology security and vulnerabilities?
- 3. What laws, policies, or other issues hinder your ability to ensure the integrity of elections you administer?
- 4. What evidence or information do you have regarding instances of voter fraud or registration fraud in your state?
- 5. What convictions for election-related crimes have occurred in your state since the November 2000 federal election?
- 6. What recommendations do you have for preventing voter intimidation or disenfranchisement?
- 7. What other issues do you believe the Commission should consider?

In addition, in order for the Commission to fully analyze vulnerabilities and issues related to voter registration and voting, I am requesting that you provide to the Commission the publicly-available voter roll data for North Carolina, including, if publicly available under the laws of your state, the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social

security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.

You may submit your responses electronically to <u>ElectionIntegrityStaff@ovp.eop.gov</u> or by utilizing the Safe Access File Exchange ("SAFE"), which is a secure FTP site the federal government uses for transferring large data files. You can access the SAFE site at <a href="https://safe.amrdec.army.mil/safe/Welcome.aspx">https://safe.amrdec.army.mil/safe/Welcome.aspx</a>. We would appreciate a response by July 14, 2017. Please be aware that any documents that are submitted to the full Commission will also be made available to the public. If you have any questions, please contact Commission staff at the same email address.

On behalf of my fellow commissioners, I also want to acknowledge your important leadership role in administering the elections within your state and the importance of state-level authority in our federalist system. It is crucial for the Commission to consider your input as it collects data and identifies areas of opportunity to increase the integrity of our election systems.

I look forward to hearing from you and working with you in the months ahead.

Sincerely,

Kris W. Kobach Vice Chair

vice Chan

Kris Kobach

Presidential Advisory Commission on Election Integrity

# Exhibit 4

#### IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JIM HENRY PERKINS and JESSIE FRANK QUALLS, on their own behalf and on the behalf of all others similarly situated,

Plaintiffs,

v. CV No. 2:07-310-IPJ

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; et al.

Defendants.

#### MEMORANDUM OPINION

This case is before the court upon remand from the Eleventh Circuit to conduct a "claim-by-claim" analysis to determine the validity of plaintiffs' remaining challenges brought under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, and seeking to enforce provisions of the Privacy Act, 5 U.S.C. § 552a; the E-Government Act of 2002, 44 U.S.C. § 3501 note; and the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 5724. Only counts two, five, six, and eight remain, and the court examines each claim in turn.

#### Factual Background

On January 22, 2007, an employee of the U.S. Department of Veterans

Affairs ("VA") reported an external hard drive containing personally identifiable information and individually identifiable health information of over 250,000 veterans was missing from the Birmingham, Alabama Medical Center's Research Enhancement Award Program ("REAP"). VA Office of Inspector General ("OIG") Report, at 7. The IT Specialist responsible for the external hard drive, "John Doe," used the hard drive to back up data on his computer and other data from a shared network drive. The hard drive is thought to contain the names, addresses, social security numbers ("SSN"), dates of birth, phone numbers, and medical files of hundreds of thousands of veterans and also information on more than 1.3 million medical providers. VA OIG Report at 7, 9 (doc. 33-2). To date, it has not been recovered.

John Doe was an IT Specialist working for the Birmingham REAP, a program that focused on "changing the practices of health care providers to ensure that they provide the latest evidence-based treatment, and on using VA databases

<sup>&</sup>lt;sup>1</sup>The REAP Director approved the purchase of external hard drives as a means to provide more space to the Medical Center's near-full server. VA OIG Report, at 15. No policy required the protection of sensitive data on removable computer storage devices unless such devices were to be carried outside a VA facility. *Id.* at 16. The REAP Director claimed the Information Security Officer ("ISO") conferred with him in making the decision to purchase the external hard drives, but the ISO claimed he was not involved and did not know of the need for additional server space. The VA OIG concluded no one made a timely request to the ISO for additional space. VA OIG Report, at 15.

to link the care of VA patients to more general information on the population as a whole." *Id.* at 3. To reach these goals, the Birmingham REAP collects data on patients and medical providers from multiple sources for dozens of separate research projects." *Id.* The Data Unit of the Birmingham REAP was comprised of the Data Unit Manager, three IT Specialists, and two student program support Assistants. *Id.* at 4. John Doe worked "with national VA databases and design[ed] statistical programs to support Birmingham REAP research projects." *Id.* 

The VA OIG identified three projects for which John Doe was conducting research. The first "involved developing a set of performance measures for diabetes management, specifically aimed at intensifying medication to improve glucose levels, cholesterol, and blood pressure"; the second "involved examining the quality of care to patients following myocardial infarction . . ., and attempted to determine whether certain demographic characteristics of the medical providers, such as their age, impacted the care rendered to these patients"; and the third "involved using a patient survey to identify use of over-the-counter medications in patients taking prescription medications and link the information obtained to various VA databases to determine whether patients suffered any adverse effects from the combination of medications." *Id.* at 22, 25, 30. In gathering the information needed to complete these projects, John Doe improperly received

access to various databases and stores of information, and various components of the VA improperly released information to John Doe or gave John Doe such access. *Id.* at 22-33. He was therefore able "to accumulate and store vast amounts of individually identifiable health information that was beyond the scope of the projects he was working on. [The OIG] believe[s] much of this information was stored on the missing external hard drive." *Id.* at 22. Accurate reporting of what information was on the external hard drive has been difficult because the hard drive is still missing; John Doe encrypted or deleted multiple files from his computer after reporting the data missing; and John Doe was not initially forthright with criminal investigators. *Id.* at ii.

After John Doe reported the missing hard drive on January 22, 2007, the VA Security Operations Center ("SOC") was immediately notified. *Id.* at 7. The SOC wrote a report and provided it to the VA OIG on January 23, 2007; on that same day, an OIG criminal investigator came to the Birmingham VAMC and conducted an interview. The Federal Bureau of Investigation became involved in the investigation on January 24, 2007. A forensic analysis of John Doe's computer began on January 29, 2007, and on February 1, 2007, the OIG began to analyze what data could have been on the missing hard drive. *Id.* at 8, 9. Press releases dated on February 2 and 10, 2007, discussed the loss of the hard drive and the information it contained.

Subsequent to the reported loss of the Birmingham REAP data but prior to receiving the results of the OIG analysis of this data on February 7, 2007, VA senior management concluded that anyone whose SSN was thought to be contained in any of the missing files, irrespective of the ability of anyone possessing this data to match an SSN with a name or any other personal identifier, should be notified and offered credit protection. The basis for this decision was a memorandum issued on November 7, 2006. . . . The memorandum states that "in the event of a data loss involving individual and personal information. . . VA officials have a responsibility to notify the individual(s) of the loss in a timely manner and to offer these protection services."

*Id.* at 11. The VA sent letters to those individuals whose information was thought to be compromised by the data breach, which gave them the option of one year of free credit monitoring services. *Id.* at 12.

The VA had also requested the Department of Health and Human Services to perform a risk analysis focusing on the Centers for Medicaid and Medicare Services ("CMS") data involved in the breach. *Id.* The missing external hard drive contained approximately 1.3 million health care providers' information,

including the SSNs of 664,165 health care providers. *Id.* On March 28, 2007, the CMS Chief Information Officer and Director sent a letter to the VA Assistant Secretary for Office of Information and Technology that stated, based on the CMS's completed independent risk analysis:

[T]here is a high risk that the loss of personally identifiable information may result in harm to the individuals concerned. The letter requested that "VA immediately take appropriate countermeasures to mitigate any risk of harm, including notifying affected individuals in writing and offering free credit monitoring to individuals whose personal information may have been contained on the file."

*Id.* From April 17 to May 22, 2007, the VA sent notification letters to the 1.3 million health care providers. *Id.* By May 31, 2007, it sent additional letters offering one year of credit monitoring to the 664,165 health care providers whose SSNs appeared to be on the hard drive. VA OIG Report, at 12.

#### Analysis

A valid claim under the APA must attack agency action, which is defined as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act." Fanin v. U.S. Dep't of

Veterans Aff., 572 F.3d 868, 877 (11th Cir. 2009) (citing 5 U.S.C. § 551(13)). If the claim attacks an agency's action, instead of failure to act, and the statute allegedly violated does not provide a private right of action, then the "agency action" must also be a "final agency action." [5 U.S.C. § 704; see also Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 61-62, 124 S.Ct. 2373, 2379 (2004)]. "To be considered 'final,' an agency's action: (1) must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature; and (2) must be one by which rights or obligations have been determined, or from which legal consequences will flow. U.S. Steel Corp. v. Astrue, 495 F.3d 1272, 1280 (11th Cir. 2007)(quoting Bennett v. Spear, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 1168 (1997)).

*Id.* However, if the claim challenges a failure to act, the court may compel "agency action unlawfully withheld or unreasonably delayed. . . only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *Id.* at 877-878 (citing *Norton*, 542 U.S. at 64) (emphasis in original).

Further, the court notes the remaining claims seek only injunctive and

declaratory relief. Such relief may be granted only if the plaintiffs demonstrate that they are "likely to suffer future injury." City of Los Angeles v. Lyons, 461 U.S. 95, 105, 103 S.Ct. 1660, 1667 (1983); Lujan v. Defenders of Wildlife, 504 U.S. 555, 564, 112 S.Ct. 2130, 2138 (1992) (citing Lyons, 461 U.S. at 102) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.""): Seigel v. LePore, 234 F.3d 1163, 1176-77 (11th Cir. 2000) (en banc) ("As we have emphasized on many occasions, the asserted irreparable injury "must be neither remote nor speculative, but actual and imminent.") (citations omitted). *Emory v. Peeler*, 756 F.2d 1547, 1552 (11<sup>th</sup> Cir. 1985) (To grant declaratory relief, "there must be a substantial continuing controversy between parties having adverse legal interests. The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. Additionally, the continuing controversy . . . must be real and immediate, and create a definite, rather than speculative threat of future injury.").

#### Count Two

The plaintiffs claim that the VA failed "to create and maintain an accounting of the date, nature, and purpose of its disclosures" pursuant to the Privacy Act, 5 U.S.C. § 552a(c)(1), when John Doe accessed VA files to complete

VA projects. Joint Status Report ("JSR"), at 8 (doc. 56). The Privacy Act requires [e]ach agency, with respect to each system of records under its control, shall—

- (1) except for disclosures made under subsections (b)(1) or
- (b)(2) of this section, keep an accurate accounting of—
  - (A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and
  - (B) the name and address of the person or agency to whom the disclosure is made. . .

5 U.S.C. § 552a(c)(1). Under the exception provided in subsection (b)(1), agencies need not provide an accounting for disclosures made to "officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C. § 552a(b)(1). Accordingly, to the extent John Doe needed the information that he accessed to perform his duties, the VA had no obligation to account.

To the extent John Doe had no need for the information contained on the external hard drive in the performance of his duties, the plaintiffs must show the disclosure was pursuant to one of the provisions in 5 U.S.C. § 552a(b)(3)-(12).

See 5 U.S.C. § 552a(c)(1)(A). After failing to argue in the JSR that any of those subsections apply, plaintiffs now claim that the VA's disclosure to John Doe falls under 5 U.S.C. § 552a(b)(5), which requires accounting when the disclosure is "to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable."

However, the accounting requirement in 5 U.S.C. § 552a(b)(5) is not triggered by the activity at issue in this case. An accounting is required only upon a disclosure to a recipient described in that subsection. Although "recipient" is not defined in the Privacy Act, it does not stand to reason that an agency that maintains records needed by one of its own researchers to fulfill his duties would be required to provide *itself* with "advance adequate written assurance that the record will be used solely as a statistical research or reporting record." Indeed, pertinent legislative history and Office of Management and Budget ("OMB") regulations suggest that an accounting was only intended when the disclosures were to individuals or agencies outside the agency maintaining the record. See S. REP. No. 93-1183 (1974) reprinted in U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 6916, 6967 (stating that subsection 201(b)(4) "[r]equires any federal agency that maintains a personal information system or file to maintain an accurate accounting of the date, nature, and purpose of nonregular access

granted to the system, and each disclosure of personal information made to any person *outside the agency, or to another agency*. . . .") (emphasis added); H.R. No. 93-1416, 2 (describing the summary and purpose of the Act as "requir[ing] agencies to keep an accounting of transfers of personal records *to other agencies and outsiders*"); 40 Fed. Reg. 28955 (July 9, 1975) (differentiating between "agencies disclosing records" and "recipient agencies" in the context of 5 U.S.C. § 552a(b)(5)).

Even if subsection (b)(5) is applicable in this case, the plaintiffs argue only that John Doe gave an advance adequate written assurance before accessing information from only one database, the Veterans Integrated Service Network ("VISN") 7 Data Warehouse. Plaintiff's Response (doc. 64) at 4. Accordingly, subsection (b)(5) applies only for John Doe's access to the VISN 7 Data Warehouse to perform research for "Project 1," which involved diabetes management research. *See* VA OIG Report, at 22. Moreover, the plaintiffs cannot show that any failure to account for John Doe's access to the VISN 7 Data Warehouse to research diabetes management is causing them harm. Although the plaintiffs are upset about the loss of their personal information and the prospect of potential credit fraud in the future, any accompanying harm is attributable to the

loss of the information in the first place, *not* the purported failure to account.<sup>2</sup> Thus, even assuming *arguendo* that 5 U.S.C. § 552a(b)(5) applies, the plaintiffs cannot show that the alleged harm is fairly traceable to the VA's conduct, a deficiency fatal to their claim. *See Allen v. Wright*, 468 U.S. 737, 753 & n.19, 104 S.Ct. 3315, 3325 & n.19 (1984) (plaintiffs do not have standing where they failed to allege injuries that are caused by the defendants).

Because of these sufficient and independent reasons, the plaintiffs have not shown that the VA failed to take discrete agency action that it was required to take. Accordingly, the court finds that the plaintiffs have failed to state a claim upon which relief can be granted, and Count Two is due to be **DISMISSED**.

<sup>&</sup>lt;sup>2</sup>The plaintiffs urge, "The Veterans have a right to know what information [was on the hard drive]. They deserve to know the 'purpose' for which John Doe was using the information," Plaintiff's Response, at 8 (doc. 64). However, the VA OIG report details, to the extent determinable, the information on the hard drive and the purpose for which John Doe was accessing the information. The VA OIG Report states that the hard drive is believed to contain "personally identifiable information and/or individually identifiable health information for over 250,000 veterans, and information obtained from the [CMS], on over 1.3 million medical providers." VA OIG Report, at i. Moreover, it was difficult for the VA to make such a determination, as John Doe was not candid when he was interviewed; he deleted or encrypted files from his computer after the hard drive went missing; and he tried to hide the extent, magnitude, and impact of the missing data. Id. at ii. Lastly, the plaintiffs know that the purpose John Doe was accessing the VISN 7 Data Warehouse was related to his research for "Project 1," id. at 22-23, which "involved developing a set of performance measures for diabetes management, specifically aimed at intensifying medication to improve glucose levels, cholesterol, and blood pressure," VA OIG Report, at 22.

## **Count Five**

Count Five involves the VA's alleged failure to establish appropriate safeguards in violation of the Privacy Act, 5 U.S.C. § 552a(e)(10). The plaintiffs have failed to argue that the alleged conduct of the VA constituted a failure of discrete agency action that the VA was required to take, but request that Count Five "move forward as detailed in the Plaintiffs' Statement in the Joint Report." Plaintiff's Brief, at 13 (doc. 64). In the Joint Status Report, the plaintiffs devote just over one page to briefing this issue and cite 5 U.S.C. § 552a(e)(10), arguing that the VA failed to enforce this subsection in the numerous ways listed in their complaint. Joint Status Report ("JSR"), at 10-11 (doc. 56). The plaintiffs then

<sup>&</sup>lt;sup>35</sup> U.S.C. § 552a(e)(10) requires the VA to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained."

<sup>&</sup>lt;sup>4</sup>Plaintiffs cite specifically to paragraph 80 of the Second Amended Complaint (doc. 21), which states:

Among other things, Defendants' failures include operating a computer system or database from which an employee, including John Doe, can download or copy information, like the Personal Information and the Medical Information, onto the VA External Hard Drive without proper encryption and when not necessary to perform his or her duties; failing to conduct a data access inventory for John Doe and other VA employees and contractors with access to the VA's office at the Pickwick Conference Center; failing to provide software that would require or enable encryption of data downloaded or copied

ask the court for an injunction forcing full implementation and compliance "with Handbook 6500 and other procedures and policies put in place in Birmingham by the VA in response to this incident, to conduct an independent audit of its compliance, and to file that audit with the court." Plaintiff's Response, at 14 (doc. 64) (footnotes added). Such an injunction is untenable.

Handbook 6500 is a seventy-one page (seven appendices excluded) document that details the responsibilities of almost two dozen information security personnel and dozens of policies and procedures. As pointed out by the defense, policies explained in the Handbook include maintaining the temperature in the building and proper use of the facsimile machines. In addition, the "other procedures and policies" put in place at the Birmingham facility are also

Second Amended Complaint (doc. 21), ¶ 80.

to mobile hard drives and devices, like the VA External Hard Drive from VA computers and databases at the VA offices and facilities in the Birmingham, Alabama area; failing to secure the VA External Hard Drive under lock and key when not in the immediate vicinity of John Doe; failing to house and protect the VA External Hard Drive to reduce the opportunities for unauthorized access, use, or removal; failing to provide intrusion detection systems at the VA office at the Pickwick Conference Center; failing to store the VA External Hard Drive in a secure area that requires proper escorting for access; failing to require and conduct appropriate background checks on all VA employees and contractors with access to the VA Office in the Pickwick Conference Center; and failing to protect against the alienation and relinquishment of control over the VA External Hard Drive, causing the Personal Information and Medical Information to be exposed to unidentified third parties.

numerous. See e.g., VA Directive 6504 (doc. 61-3) (governing the transmission, transportation and use of, and access to, VA data outside VA facilities); VA Handbook 6500, at 7 (doc. 61-4) (a seventy-one page document "establish[ing] the foundation for VA's comprehensive information security program and its practices that will protect the confidentiality, integrity, and availability of information"); Medical Center Memo 00-ISO-02 (doc. 61-5) ("assign[ing] responsibility and establish[ing] procedures for managing computer files at the Birmingham VA Medical Center"); Medical Center Memo 00-ISO-05 (doc. 61-6) (requiring VA employees at the Medical Center to get permission before use of removable storage media, especially Universal Serial Bus ("USB") devices, and requiring written permission for the removal of sensitive information from VA facilities); Information Security Program VISN 7 AIS Operational Security Policy (doc. 61-9) (establishing procedures to implement a "structured program to safeguard all IT assets"); Memorandum 10N7-077 of VISN 7 VA Southeast Network (doc. 61-10) (stating "It is the policy of VISN 7 that no sensitive information ([personal health information or personal identifiable information]) will be stored on the storage media of any device without encryption or where the device is not *physically* secured to prevent accidental loss of sensitive information in the event of theft") (emphasis in original).

Cases that suggest a broad injunction enforcing all of these policies is

appropriate are "relic[s] of a time when the federal judiciary thought that structural injunctions taking control of executive functions were sensible. That time has past." *Rahman v. Chertoff*, 530 F.3d 622, 626 (7<sup>th</sup> Cir. 2008). "The limitation to discrete agency action precludes the kind of broad programmatic attack [the Supreme Court] rejected in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct 3177, 111 L.Ed.2d 695 (1990)." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64, 124 S.Ct. 2373, 2379-2380 (2004); *see Lujan*, 497 U.S. at 891 When presented with similar circumstances in *Lujan*, the Supreme Court responded:

Respondent alleges that violation of the law is rampant within this program-failure to revise land plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, failure to provide adequate environmental impact statements. Perhaps so. But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the office of the Department or the halls of Congress, where programmatic improvements are normally made.

Lujan, 497 U.S. at 891. Courts are not empowered to compel "compliance with

broad statutory mandates," *Norton*, 542 U.S. at 66-67, nor can they engage in general review of an agency's day-to-day operations to ensure such compliance. *Id.*; *Lujan*, 497 U.S. at 899.

Even if this court could pass on such a generalized challenge, the court is convinced that Count Five is moot.

"[A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' "County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 59

L.Ed.2d 642 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). The underlying concern is that, when the challenged conduct ceases such that "there is no reasonable expectation that the wrong will be repeated," United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), then it becomes impossible for the court to grant "any effectual relief whatever' to [the] prevailing party," Church of Scientology of Cal. v. United States, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (quoting Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)).

City of Erie v. Pap's A.M., 529 U.S. 277, 287, 120 S.Ct. 1382, 1390 (2000).

Because the evidence submitted to the court shows that new security procedures and policies have been implemented and the deficiencies revealed in the VA OIG Report have been remedied, there is no "live" issue for which this court can grant effectual relief.

## **Count Six**

In Count Six, the plaintiffs claim that the VA failed to perform a privacy impact assessment ("PIA") pursuant to the E-Government Act of 2002 when it procured the external hard drives. Pursuant to the E-Government Act, agencies must perform a PIA before "developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form." 44 U.S.C. § 3501 note (E-Government Act of 2002, § 208(b)(1)(A)). The definition of "information technology" includes "any equipment or interconnected system . . . used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly . . . . " 40 U.S.C. § 11101(6); see 44 U.S.C. § 3501 note, § 201 (applying definitions from 44 U.S.C. §§ 3502, 3601); 44 US.C. § 3502(9) (applying the definition of 40 U.S.C. § 11101(6)). The disputed issue is whether the purchase of the external hard drives triggered the duty to perform a PIA.

The plaintiffs claim that the inclusion of "any equipment" in the definition of information technology brings the hard drives within the meaning of the term, thereby requiring the PIA. However, such an interpretation is implausible, as it would require government agencies that maintain personal information on individuals to conduct or update a PIA each time it purchases any computer, monitor, router, telephone, calculator, or other piece of equipment involved in a system that stores, analyzes, or manages the data. Rather, the purchase of several external hard drives, seems to be a "minor change[] to a system or collection that do[es] not create new privacy risks," and therefore does not require a PIA. *See* M-03-22, Attachment A 2.B.3.g., Office and Management and Budget ("OMB") Guidance Implementing the Privacy Provisions of the E-Government Act of 2002, at Section II.B.3.f (doc. 61-15) (hereinafter "M-03-22").

Lending support to this interpretation is the fact that PIAs are required to address (1) what information is collected and why, (2) the agency's intended use of the information, (3) with whom the information would be shared, (4) what opportunities the veterans would have to decline to provide information or to decline to share the information, (5) how the information would be secured, and (6) whether a system of records is being created. *See* 44 U.S.C. § 3501 note (E-Government Act of 2002, § 208(b)(2)(B)); M-03-22, at Section II.C.1.a. These types of inquiries are certainly appropriate and required when the VA initially

created the Birmingham VAMC system and began collecting data, but not where already collected and stored data is simply being transferred from a server to an external hard drive. The factors above are not relevant for such a transfer and a new PIA would not be informative of what information is being collected, the intended use of the information, or with whom the information would be shared. Under such circumstances, Congress surely did not intend a PIA to be performed.

To the extent the plaintiffs argue that security procedures were not followed or hardware security protocols were breached at the VA facility in Birmingham when the external hard drive went missing, such claims are not actionable under the E-Government Act of 2002. Rather, those arguments should have been pursued pursuant to the Federal Information Security Management Act (FISMA), 44 U.S.C. §§ 3541 *et seq.*, a claim that the plaintiffs waived after not pursuing it on appeal. *Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 876 n.1.

## Count 8

The final count before the court involves the VA's alleged failure to perform an independent risk analysis ("IRA") to determine the risk presented by the loss of the hard drive pursuant to the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VBHCITA), 38 U.S.C. § 5724(a)(1). The plaintiffs also claim that the VA acted unreasonably by providing only one year of credit monitoring services.

The VBHCITA<sup>5</sup> provides:

In the event of a data breach with respect to sensitive personal information that is processed or maintained by the Secretary, the Secretary shall ensure that, as soon as possible after the data breach, a non-Department entity or the Office of Inspector General of the Department conducts an independent risk analysis of the data breach to determine the level of risk associated with the data breach for the potential misuse of any sensitive personal information involved in the data breach.

38 U.S.C. § 5724(a)(1).

After John Doe reported the missing hard drive on January 22, 2007, the VA launched an immediate investigation that culminated in the decision to offer one year of free credit monitoring services for 198,760 living individuals whose information was contained on the hard drive. VA OIG Report, at 12. The VA made this decision *before* the completion of the IRA conducted by the Centers for Medicaid & Medicare Services ("CMS"). On February 7, 2007, VA senior

<sup>&</sup>lt;sup>5</sup>The VBHCITA became effective December 22, 2006. The data breach incident at issue occurred on January 22, 2007. The VA passed regulations that became effective June 22, 2007, six months after the passage of the VBHCITA and five months after the loss of the external hard drive.

management decided that anyone whose SSN was on the hard drive should be notified and offered credit protection. *Id.* at 11. Approximately one and one-half months later, on March 28, 2007, the CMS Chief Information Officer and Director stated that based on the IRA, "There is a high risk that the loss of personally identifiable information may result in harm to the individuals concerned." *Id.* at 12. He recommended that the "VA immediately take appropriate countermeasures to mitigate any risk of harm, including notifying affected individuals in writing and offering free credit monitoring to individuals whose personal information may have been contained on the file." *Id.* Notification letters were sent out to the health care providers by May 31, 2007. *Id.* 

Thus, the VA proactively assumed that the veterans were at risk and provided the remedy provided in the statute<sup>6</sup> *before* it had confirmation from the IRA that such a remedy was appropriate under the circumstances. By presuming a reasonable risk of harm from the disclosure of personally identifiable information and providing credit protection services required when an IRA reveals a "reasonable risk" of harm, *see* 38 U.S.C. § 5724(a)(2), the VA has provided the

<sup>&</sup>lt;sup>6</sup>In addition, VA regulations limit credit monitoring awarded to those who are subject to a reasonable risk for misuse of sensitive personal information to one year. 38 C.F.R. § 75.118(a).

plaintiffs with any relief they are due.<sup>7</sup> Indeed, the IRA conducted by CMS affirmed the propriety of the relief offered by the VA.

Despite having been given such relief, the plaintiffs insist the IRA was insufficient and urge an additional IRA focusing on the veterans must be completed. However, the statute does not require an *individual* risk analysis as the plaintiffs state in their JSR, *See* JSR, at 12-13, 15, only an *independent* risk analysis. The VA OIG Report contains multiple groups of individuals whose private information was compromised: veterans, VA OIG Report, at 7; physicians, *id.* at 10; deceased physicians, *id.*; other health care providers, *id.*; non-veteran, non-VA employees, *id.* at 24; and VA employees, *id.* Furthermore, some veterans were only identified by their SSNs; others were identified by SSNs and dates of birth; others by their name, SSN, and medical information; and others identified

<sup>&</sup>lt;sup>7</sup> The plaintiffs offer a General Accountability Office report that states that a May 5, 2006, incident involving a missing tape with sensitive information of thousands of individuals on it warranted "credit protection and data breach analysis for 2 years." JSR, at 14. As the plaintiffs explain, however, only one year of credit protection was offered, while two years of breach analysis was given. Declaration of Michael Hogan ("Hogan Decl."), ¶¶ 2 (doc. 61-19) and Attachment A (doc. 61-20).

<sup>&</sup>lt;sup>8</sup>The plaintiffs' argument that the CMS was an inappropriate entity to perform the IRA has no merit, as the statute requires either the VA OIG or a non-Department [of Veterans Affairs] entity to conduct the IRA. 38 U.S.C. § 5724(a)(1). The CMS is under the purview of the Department of Health and Human Services.

by various combinations of seven fields of identifying information. *Id.* at 9. The health care providers are identified on the hard drive by different combinations of forty-eight different fields of data. *Id.* at 10. All of this information was on a single external hard drive lost during a single data breach. The statute only requires an "independent risk analysis of the data breach," not multiple IRAs for each group of individuals whose information was compromised. *See* 38 U.S.C. § 5724(a)(1).

Because the plaintiffs were awarded appropriate relief and because the VA conducted an adequate IRA of the data breach, the court finds that the VA did not fail to take agency action it was required to take with respect to count eight.

# Conclusion

Having considered the foregoing and being of the opinion that the plaintiffs have failed to properly state any claims challenging final agency action under the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, the court finds that Counts Two, Five, Six, and Eight shall be **DISMISSED**. The court shall so rule by separate order.

DONE and ORDERED, this the 21st day of April 2010.

INGE PRYTZ JOHNSON U.S. DISTRICT JUDGE

# Exhibit 5

This is historical material, "frozen in time" and not current OMB guidance. The web site is no longer updated and links to external web sites and some internal pages will not work.



September 26, 2003

M-03-22

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:

Joshua B. Bolten

DirectoR

SUBJECT:

OMB Guidance for Implementing the Privacy Provisions of the E-

Government Act of 2002

The attached guidance provides information to agencies on implementing the privacy provisions of the E-Government Act of 2002, which was signed by the President on December 17, 2002 and became effective on April 17, 2003.

The Administration is committed to protecting the privacy of the American people. This guidance document addresses privacy protections when Americans interact with their government. The guidance directs agencies to conduct reviews of how information about individuals is handled within their agency when they use information technology (IT) to collect new information, or when agencies develop or buy new IT systems to handle collections of personally identifiable information. Agencies are also directed to describe how the government handles information that individuals provide electronically, so that the American public has assurances that personal information is protected.

The privacy objective of the E-Government Act complements the National Strategy to Secure Cyberspace. As the National Strategy indicates, cyberspace security programs that strengthen protections for privacy and other civil liberties, together with strong privacy policies and practices in the federal agencies, will ensure that information is handled in a manner that maximizes both privacy and security.

#### **Background**

Section 208 of the E-Government Act of 2002 (Public Law 107-347, 44 U.S.C. Ch 36) requires that OMB issue guidance to agencies on implementing the privacy provisions of the E-Government Act (see Attachment A). The text of section 208 is provided as Attachment B to this Memorandum. Attachment C provides a general outline of regulatory requirements pursuant to the Children's Online Privacy Protection Act ("COPPA"). Attachment D summarizes the modifications to existing guidance resulting from this Memorandum. A complete list of OMB privacy guidance currently in effect is available at OMB's website.

As OMB has previously communicated to agencies, for purposes of their FY2005 IT budget requests, agencies should submit all required Privacy Impact Assessments no later than October 3, 2003.

For any questions about this guidance, contact Eva Kleederman, Policy Analyst, Information Policy and Technology Branch, Office of Management and Budget, phone (202) 395-3647, fax (202) 395-5167, e-mail Eva\_Kleederman@omb.eop.gov.

#### Attachments

Attachment A Attachment B Attachment C Attachment D

#### Attachment A

E-Government Act Section 208 Implementation Guidance

#### I. General

#### A. Requirements. Agencies are required to:

- 1. conduct privacy impact assessments for electronic information systems and collections and, in general, make them publicly available (see Section II of this Guidance),
- 2. post privacy policies on agency websites used by the public (see Section III),
- 3. translate privacy policies into a standardized machine-readable format (see Section IV), and
- report annually to OMB on compliance with section 208 of the E-Government Act of 2002 (see Section VII).

#### B. Application. This guidance applies to:

- 1. all executive branch departments and agencies ("agencies") and their contractors that use information technology or that operate websites for purposes of interacting with the public;
- 2. relevant cross-agency initiatives, including those that further electronic government.

C. *Modifications to Current Guidance.* Where indicated, this Memorandum modifies the following three memoranda, which are replaced by this guidance (see summary of modifications at Attachment D):

- Memorandum 99-05 (January 7, 1999), directing agencies to examine their procedures for ensuring the privacy of personal information in federal records and to designate a senior official to assume primary responsibility for privacy policy;
- 2. Memorandum 99-18 (June 2, 1999), concerning posting privacy policies on major entry points to government web sites as well as on any web page collecting substantial personal information from the public; and
- 3. Memorandum 00-13 (June 22, 2000), concerning (i) the use of tracking technologies such as persistent cookies and (ii) parental consent consistent with the Children's Online Privacy Protection Act ("COPPA").

#### **II. Privacy Impact Assessment**

#### A. Definitions.

- 1. *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.<sup>1</sup>
- 2. Information in identifiable form- is information in an IT system or online collection: (i) that directly identifies an individual (e.g., name, address, social security number or other identifying number or code, telephone number, email address, etc.) or (ii) by which an agency intends to identify specific individuals in conjunction with other data elements, i.e., indirect identification. (These data elements may include a combination of gender, race, birth date, geographic indicator, and other descriptors).<sup>2</sup>
- 3. *Information technology (IT)* means, as defined in the Clinger-Cohen Act<sup>3</sup>, any equipment, software or interconnected system or subsystem that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.
- 4. Major information system embraces "large" and "sensitive" information systems and means, as defined in OMB Circular A-130 (Section 6.u.) and annually in OMB Circular A-11 (section 300-4 (2003)), a system or project that requires special management attention because of its: (i) importance to the agency mission, (ii) high development, operating and maintenance costs, (iii) high risk, (iv) high return, (v) significant role in the administration of an agency's programs, finances, property or other resources.
- 5. National Security Systems means, as defined in the Clinger-Cohen Act<sup>4</sup>, an information system operated by the federal government, the function, operation or use of which involves: (a) intelligence activities, (b) cryptologic activities related to national security, (c) command and control of military forces, (d) equipment that is an integral part of a weapon or weapons systems, or (e) systems critical to the direct fulfillment of military or intelligence missions, but does not include systems used for routine administrative and business applications, such as payroll, finance, logistics and personnel management.
- 6. Privacy Impact Assessment (PIA)- is an analysis of how information is handled: (i) to ensure handling conforms to applicable legal, regulatory, and policy requirements regarding privacy, (ii) to determine the risks and effects of collecting, maintaining and disseminating information in identifiable form in an electronic information system, and (iii) to examine and evaluate protections and alternative processes for handling information to mitigate potential privacy risks.
- 7. Privacy policy in standardized machine-readable format- means a statement about site privacy

practices written in a standard computer language (not English text) that can be read automatically by a web browser.

#### B. When to conduct a PIA:5

- 1. The E-Government Act requires agencies to conduct a PIA before:
  - a. developing or procuring IT systems or projects that collect, maintain or disseminate information in identifiable form from or about members of the public, or
  - b. initiating, consistent with the Paperwork Reduction Act, a new electronic collection of information in identifiable form for 10 or more persons (excluding agencies, instrumentalities or employees of the federal government).
- 2. In general, PIAs are required to be performed and updated as necessary where a system change creates new privacy risks. For example:
  - a. Conversions when converting paper-based records to electronic systems;
  - b. Anonymous to Non-Anonymous when functions applied to an existing information collection change anonymous information into information in identifiable form;
  - c. Significant System Management Changes when new uses of an existing IT system, including application of new technologies, significantly change how information in identifiable form is managed in the system:
    - For example, when an agency employs new relational database technologies or webbased processing to access multiple data stores; such additions could create a more open environment and avenues for exposure of data that previously did not exist.
  - d. Significant Merging when agencies adopt or alter business processes so that government databases holding information in identifiable form are merged, centralized, matched with other databases or otherwise significantly manipulated:
    - For example, when databases are merged to create one central source of information; such a link may aggregate data in ways that create privacy concerns not previously at issue
  - e. New Public Access when user-authenticating technology (e.g., password, digital certificate, biometric) is newly applied to an electronic information system accessed by members of the public;
  - f. Commercial Sources when agencies systematically incorporate into existing information systems databases of information in identifiable form purchased or obtained from commercial or public sources. (Merely querying such a source on an ad hoc basis using existing technology does not trigger the PIA requirement);
  - g. New Interagency Uses when agencies work together on shared functions involving significant new uses or exchanges of information in identifiable form, such as the cross-cutting E-Government initiatives; in such cases, the lead agency should prepare the PIA;
    - For example the Department of Health and Human Services, the lead agency for the Administration's Public Health Line of Business (LOB) Initiative, is spearheading work with several agencies to define requirements for integration of processes and accompanying information exchanges. HHS would thus prepare the PIA to ensure that all privacy issues are effectively managed throughout the development of this cross agency IT investment.
  - Internal Flow or Collection when alteration of a business process results in significant new uses or disclosures of information or incorporation into the system of additional items of information in identifiable form:
    - For example, agencies that participate in E-Gov initiatives could see major changes in how they conduct business internally or collect information, as a result of new business processes or E-Gov requirements. In most cases the focus will be on integration of common processes and supporting data. Any business change that results in substantial new requirements for information in identifiable form could warrant examination of privacy issues.
  - Alteration in Character of Data when new information in identifiable form added to a collection raises the risks to personal privacy (for example, the addition of health or financial information)
- 3. No PIA is required where information relates to internal government operations, has been previously assessed under an evaluation similar to a PIA, or where privacy issues are unchanged, as in the following circumstances:
  - a. for government-run websites, IT systems or collections of information to the extent that they do not collect or maintain information in identifiable form about members of the general public (this includes government personnel and government contractors and consultants);<sup>6</sup>
  - b. for government-run public websites where the user is given the option of contacting the site operator for the limited purposes of providing feedback (e.g., questions or comments) or

- obtaining additional information;
- c. for national security systems defined at 40 U.S.C. 11103 as exempt from the definition of information technology (see section 202(i) of the E-Government Act);
- d. when all elements of a PIA are addressed in a matching agreement governed by the computer matching provisions of the Privacy Act (see 5 U.S.C. §§ 552a(8-10), (e)(12), (o), (p), (q), (r), (u)), which specifically provide privacy protection for matched information;
- e. when all elements of a PIA are addressed in an interagency agreement permitting the merging
  of data for strictly statistical purposes and where the resulting data are protected from
  improper disclosure and use under Title V of the E-Government Act of 2002;
- f. if agencies are developing IT systems or collecting non-identifiable information for a discrete purpose, not involving matching with or retrieval from other databases that generates information in identifiable form;
- g. for minor changes to a system or collection that do not create new privacy risks.
- 4. *Update of PIAs:* Agencies must update their PIAs to reflect changed information collection authorities, business processes or other factors affecting the collection and handling of information in identifiable form

#### C. Conducting a PIA.

- 1. Content.
  - a. PIAs must analyze and describe:
    - i. what information is to be collected (e.g., nature and source);
    - ii. why the information is being collected (e.g., to determine eligibility);
    - iii. intended use of the information (e.g., to verify existing data);
    - iv. with whom the information will be shared (e.g., another agency for a specified programmatic purpose);
    - v. what opportunities individuals have to decline to provide information (i.e., where providing information is voluntary) or to consent to particular uses of the information (other than required or authorized uses), and how individuals can grant consent;
    - vi. how the information will be secured (e.g., administrative and technological controls<sup>7</sup>); and
    - vii. whether a system of records is being created under the Privacy Act, 5 U.S.C. 552a.
  - b. Analysis: PIAs must identify what choices the agency made regarding an IT system or collection of information as a result of performing the PIA.
- 2. Agencies should commence a PIA when they begin to develop a new or significantly modified IT system or information collection:
  - a. Specificity. The depth and content of the PIA should be appropriate for the nature of the information to be collected and the size and complexity of the IT system.
    - i. IT development stage. PIAs conducted at this stage:
      - should address privacy in the documentation related to systems development, including, as warranted and appropriate, statement of need, functional requirements analysis, alternatives analysis, feasibility analysis, benefits/cost analysis, and, especially, initial risk assessment;
      - should address the impact the system will have on an individual's privacy, specifically identifying and evaluating potential threats relating to each of the elements identified in section II.C.1.a.(i)-(vii) above, to the extent these elements are known at the initial stages of development;
      - 3. may need to be updated before deploying the system to consider elements not identified at the concept stage (e.g., retention or disposal of information), to reflect a new information collection, or to address choices made in designing the system or information collection as a result of the analysis.
    - ii. *Major information systems*. PIAs conducted for these systems should reflect more extensive analyses of:
      - 1. the consequences of collection and flow of information,
      - 2. the alternatives to collection and handling as designed,
      - 3. the appropriate measures to mitigate risks identified for each alternative and,
      - 4. the rationale for the final design choice or business process.
    - iii. Routine database systems. Agencies may use a standardized approach (e.g., checklist or template) for PIAs involving simple systems containing routine information and involving limited use and access.
  - b. *Information life cycle analysis/collaboration*. Agencies must consider the information "life cycle" (i.e., collection, use, retention, processing, disclosure and destruction) in evaluating how information handling practices at each stage may affect individuals' privacy. To be

comprehensive and meaningful, privacy impact assessments require collaboration by program experts as well as experts in the areas of information technology, IT security, records management and privacy.

- 3. Review and publication.
  - a. a. Agencies must ensure that:
    - i. the PIA document and, if prepared, summary are approved by a "reviewing official" (the agency CIO or other agency head designee, who is other than the official procuring the system or the official who conducts the PIA);
    - iii. for each covered IT system for which 2005 funding is requested, and consistent with previous guidance from OMB, the PIA is submitted to the Director of OMB no later than October 3, 2003 (submitted electronically to PIA@omb.eop.gov along with the IT investment's unique identifier as described in OMB Circular A-11, instructions for the Exhibit 300<sup>8</sup>); and
    - iii. the PIA document and, if prepared, summary, are made publicly available (consistent with executive branch policy on the release of information about systems for which funding is proposed).
      - Agencies may determine to not make the PIA document or summary publicly available to the extent that publication would raise security concerns, reveal classified (i.e., national security) information or sensitive information (e.g., potentially damaging to a national interest, law enforcement effort or competitive business interest) contained in an assessment<sup>9</sup>. Such information shall be protected and handled consistent with the Freedom of Information Act (FOIA).
      - Agencies should not include information in identifiable form in their privacy impact assessments, as there is no need for the PIA to include such information. Thus, agencies may not seek to avoid making the PIA publicly available on these grounds.
- D. Relationship to requirements under the Paperwork Reduction Act (PRA)<sup>10</sup>.
  - 1. Joint Information Collection Request (ICR) and PIA. Agencies undertaking new electronic information collections may conduct and submit the PIA to OMB, and make it publicly available, as part of the SF83 Supporting Statement (the request to OMB to approve a new agency information collection).
  - 2. If Agencies submit a Joint ICR and PIA:
    - a. All elements of the PIA must be addressed and identifiable within the structure of the Supporting Statement to the ICR, including:
      - i. a description of the information to be collected in the response to Item 1 of the Supporting Statement 11;
      - ii. a description of how the information will be shared and for what purpose in Item 2 of the Supporting Statement<sup>12</sup>:
      - iii. a statement detailing the impact the proposed collection will have on privacy in Item 2 of the Supporting Statement <sup>13</sup>;
      - iv. a discussion in item 10 of the Supporting Statement of:
        - whether individuals are informed that providing the information is mandatory or voluntary
        - 2. opportunities to consent, if any, to sharing and submission of information;
        - 3. how the information will be secured; and
        - 4. whether a system of records is being created under the Privacy Act)<sup>14</sup>.
    - b. For additional information on the requirements of an ICR, please consult your agency's organization responsible for PRA compliance.
  - 3. Agencies need not conduct a new PIA for simple renewal requests for information collections under the PRA. As determined by reference to section II.B.2. above, agencies must separately consider the need for a PIA when amending an ICR to collect information that is significantly different in character from the original collection.
- E. Relationship to requirements under the Privacy Act of 1974, 5 U.S. C. 552a.
  - 1. Agencies may choose to conduct a PIA when developing the System of Records (SOR) notice required by subsection (e)(4) of the Privacy Act, in that the PIA and SOR overlap in content (e.g., the categories of records in the system, the uses of the records, the policies and practices for handling, etc.).
  - 2. Agencies, in addition, may make the PIA publicly available in the Federal Register along with the Privacy Act SOR notice.

3. Agencies must separately consider the need for a PIA when issuing a change to a SOR notice (e.g., a change in the type or category of record added to the system may warrant a PIA).

#### III. Privacy Policies on Agency Websites

- A. *Privacy Policy Clarification*. To promote clarity to the public, agencies are required to refer to their general web site notices explaining agency information handling practices as the "Privacy Policy."
- B. *Effective Date*. Agencies are expected to implement the following changes to their websites by December 15, 2003.
- C. Exclusions: For purposes of web privacy policies, this guidance does not apply to:
  - 1. information other than "government information" as defined in OMB Circular A-130;
  - 2. agency intranet web sites that are accessible only by authorized government users (employees, contractors, consultants, fellows, grantees);
  - 3. national security systems defined at 40 U.S.C. 11103 as exempt from the definition of information technology (see section 202(i) of the E-government Act).
- D. Content of Privacy Policies.
  - 1. Agency Privacy Policies must comply with guidance issued in OMB Memorandum 99-18 and must now also include the following two new content areas:
    - a. Consent to collection and sharing 15. Agencies must now ensure that privacy policies:
      - i. inform visitors whenever providing requested information is voluntary;
      - ii. inform visitors how to grant consent for use of voluntarily-provided information; and
      - iii. inform visitors how to grant consent to use mandatorily-provided information for other than statutorily-mandated uses or authorized routine uses under the Privacy Act.
    - b. Rights under the Privacy Act or other privacy laws 16. Agencies must now also notify web-site visitors of their rights under the Privacy Act or other privacy-protecting laws that may primarily apply to specific agencies (such as the Health Insurance Portability and Accountability Act of 1996, the IRS Restructuring and Reform Act of 1998, or the Family Education Rights and Privacy Act):
      - i. in the body of the web privacy policy;
      - ii. via link to the applicable agency regulation (e.g., Privacy Act regulation and pertinent system notice); or
      - iii. via link to other official summary of statutory rights (such as the summary of Privacy Act rights in the FOIA/Privacy Act Reference Materials posted by the Federal Consumer Information Center at www.Firstgov.gov).
  - 2. Agency Privacy Policies must continue to address the following, modified, requirements:
    - a. Nature, purpose, use and sharing of information collected . Agencies should follow existing policies (issued in OMB Memorandum 99-18) concerning notice of the nature, purpose, use and sharing of information collected via the Internet, as modified below:
      - i. Privacy Act information. When agencies collect information subject to the Privacy Act, agencies are directed to explain what portion of the information is maintained and retrieved by name or personal identifier in a Privacy Act system of records and provide a Privacy Act Statement either:
        - 1. at the point of collection, or
        - via link to the agency's general Privacy Policy<sup>18</sup>.
      - ii. "Privacy Act Statements." Privacy Act Statements must notify users of the authority for and purpose and use of the collection of information subject to the Privacy Act, whether providing the information is mandatory or voluntary, and the effects of not providing all or any part of the requested information.
      - iii. Automatically Collected Information (site management data). Agency Privacy Policies must specify what information the agency collects automatically (i.e., user's IP address, location, and time of visit) and identify the use for which it is collected (i.e., site management or security purposes).
      - iv. *Interaction with children:* Agencies that provide content to children under 13 and that collect personally identifiable information from these visitors should incorporate the requirements of the Children's Online Privacy Protection Act ("COPPA") into their Privacy Policies (see Attachment C)<sup>19</sup>.
      - v. *Tracking and customization activities*. Agencies are directed to adhere to the following modifications to OMB Memorandum 00-13 and the OMB follow-up guidance letter dated September 5, 2000:
        - 1. Tracking technology prohibitions:

- a. agencies are prohibited from using persistent cookies or any other means (e.g., web beacons) to track visitors' activity on the Internet except as provided in subsection (b) below;
- agency heads may approve, or may authorize the heads of subagencies or senior official(s) reporting directly to the agency head to approve, the use of persistent tracking technology for a compelling need. When used, agency's must post clear notice in the agency's privacy policy of:
  - the nature of the information collected;
  - the purpose and use for the information;
  - whether and to whom the information will be disclosed; and
  - the privacy safeguards applied to the information collected.
- c. agencies must report the use of persistent tracking technologies as authorized for use by subsection b. above (see section VII)<sup>20</sup>.
- 2. The following technologies are not prohibited:
  - a. Technology that is used to facilitate a visitor's activity within a single session (e.g., a "session cookie") and does not persist over time is not subject to the prohibition on the use of tracking technology.
  - b. Customization technology (to customize a website at the visitor's request) if approved by the agency head or designee for use (see v.1.b above) and where the following is posted in the Agency's Privacy Policy:
    - the purpose of the tracking (i.e., customization of the site);
    - that accepting the customizing feature is voluntary;
    - that declining the feature still permits the individual to use the site; and
    - the privacy safeguards in place for handling the information collected.
  - Agency use of password access to information that does not involve "persistent cookies" or similar technology.
- vi. Law enforcement and homeland security sharing: Consistent with current practice, Internet privacy policies may reflect that collected information may be shared and protected as necessary for authorized law enforcement, homeland security and national security activities.
- b. Security of the information<sup>21</sup>. Agencies should continue to comply with existing requirements for computer security in administering their websites<sup>22</sup> and post the following information in their Privacy Policy:
  - i. in clear language, information about management, operational and technical controls ensuring the security and confidentiality of personally identifiable records (e.g., access controls, data storage procedures, periodic testing of safeguards, etc.), and
  - ii. in general terms, information about any additional safeguards used to identify and prevent unauthorized attempts to access or cause harm to information and systems.
     (The statement should be at a level to inform the public that their information is being protected while not compromising security.)
- E. *Placement of notices*. Agencies should continue to follow the policy identified in OMB Memorandum 99-18 regarding the posting of privacy policies on their websites. Specifically, agencies must post (or link to) privacy policies at:
  - 1. their principal web site;
  - 2. any known, major entry points to their sites;
  - 3. any web page that collects substantial information in identifiable form.
- F. Clarity of notices. Consistent with OMB Memorandum 99-18, privacy policies must be:
  - 1. clearly labeled and easily accessed;
  - 2. written in plain language; and
  - 3. made clear and easy to understand, whether by integrating all information and statements into a single posting, by layering a short "highlights" notice linked to full explanation, or by other means the agency determines is effective.

#### IV. Privacy Policies in Machine-Readable Formats

#### A. Actions.

1. Agencies must adopt machine readable technology that alerts users automatically about whether site privacy practices match their personal privacy preferences. Such technology enables users to make

- an informed choice about whether to conduct business with that site.
- 2. OMB encourages agencies to adopt other privacy protective tools that become available as the technology advances.
- B. **Reporting Requirement.** Agencies must develop a timetable for translating their privacy policies into a standardized machine-readable format. The timetable must include achievable milestones that show the agency's progress toward implementation over the next year. Agencies must include this timetable in their reports to OMB (see Section VII).

#### V. Privacy Policies Incorporated by this Guidance

In addition to the particular actions discussed above, this guidance reiterates general directives from previous OMB Memoranda regarding the privacy of personal information in federal records and collected on federal web sites. Specifically, existing policies continue to require that agencies:

- A. assure that their uses of new information technologies sustain, and do not erode, the protections provided in all statutes relating to agency use, collection, and disclosure of personal information:
- B. assure that personal information contained in Privacy Act systems of records be handled in full compliance with fair information practices as set out in the Privacy Act of 1974;
- C. evaluate legislative proposals involving collection, use and disclosure of personal information by the federal government for consistency with the Privacy Act of 1974;
- D. evaluate legislative proposals involving the collection, use and disclosure of personal information by any entity, public or private, for consistency with the Privacy Principles;
- E. ensure full adherence with stated privacy policies.

#### VI. Agency Privacy Activities/Designation of Responsible Official

Because of the capability of information technology to capture and disseminate information in an instant, all federal employees and contractors must remain mindful of privacy and their obligation to protect information in identifiable form. In addition, implementing the privacy provisions of the E-Government Act requires the cooperation and coordination of privacy, security, FOIA/Privacy Act and project officers located in disparate organizations within agencies. Clear leadership and authority are essential.

Accordingly, this guidance builds on policy introduced in Memorandum 99-05 in the following ways:

#### A. Agencies must:

- 1. inform and educate employees and contractors of their responsibility for protecting information in identifiable form:
- 2. identify those individuals in the agency (e.g., information technology personnel, Privacy Act Officers) that have day-to-day responsibility for implementing section 208 of the E-Government Act, the Privacy Act. or other privacy laws and policies.
- 3. designate an appropriate senior official or officials (e.g., CIO, Assistant Secretary) to serve as the agency's principal contact(s) for information technology/web matters and for privacy policies. The designated official(s) shall coordinate implementation of OMB web and privacy policy and guidance.
- designate an appropriate official (or officials, as appropriate) to serve as the "reviewing official(s)" for agency PIAs.
- B. OMB leads a committee of key officials involved in privacy that reviewed and helped shape this guidance and that will review and help shape any follow-on privacy and web-privacy-related guidance. In addition, as part of overseeing agencies' implementation of section 208, OMB will rely on the CIO Council to collect information on agencies' initial experience in preparing PIAs, to share experiences, ideas, and promising practices as well as identify any needed revisions to OMB's guidance on PIAs.

#### VII. Reporting Requirements

Agencies are required to submit an annual report on compliance with this guidance to OMB as part of their annual E-Government Act status report. The first reports are due to OMB by December 15, 2003. All agencies that use information technology systems and conduct electronic information collection activities must complete a report on compliance with this guidance, whether or not they submit budgets to OMB.

Reports must address the following four elements:

- A. Information technology systems or information collections for which PIAs were conducted. Include the mechanism by which the PIA was made publicly available (website, Federal Register, other), whether the PIA was made publicly available in full, summary form or not at all (if in summary form or not at all, explain), and, if made available in conjunction with an ICR or SOR, the publication date.
- B. Persistent tracking technology uses. If persistent tracking technology is authorized, include the need that

- compels use of the technology, the safeguards instituted to protect the information collected, the agency official approving use of the tracking technology, and the actual privacy policy notification of such use.
- C. Agency achievement of goals for machine readability: Include goals for and progress toward achieving compatibility of privacy policies with machine-readable privacy protection technology.
- D. Contact information. Include the individual(s) (name and title) appointed by the head of the Executive Department or agency to serve as the agency's principal contact(s) for information technology/web matters and the individual (name and title) primarily responsible for privacy policies.

#### Attachment B E-Government Act of 2002 Pub. L. No. 107-347, Dec. 17, 2002

#### SEC. 208. PRIVACY PROVISIONS.

A. PURPOSE. — The purpose of this section is to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government.

#### B. PRIVACY IMPACT ASSESSMENTS.—

- 1. RESPONSIBILITIES OF AGENCIES.
  - a. IN GENERAL.—An agency shall take actions described under subparagraph (b) before
    - i. developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form; or
    - ii. initiating a new collection of information that-
      - 1. will be collected, maintained, or disseminated using information technology; and
      - 2. includes any information in an identifiable form permitting the physical or online contacting of a specific individual, if identical questions have been posed to, or identical reporting requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the Federal Government.
  - b. AGENCY ACTIVITIES. —To the extent required under subparagraph (a), each agency shall
    - i. conduct a privacy impact assessment;
    - ii. ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and
    - iii. if practicable, after completion of the review under clause (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means.
  - c. SENSITIVE INFORMATION. —Subparagraph (b)(iii) may be modified or waived for security reasons, or to protect classified, sensitive, or private information contained in an assessment.
  - d. COPY TO DIRECTOR. —Agencies shall provide the Director with a copy of the privacy impact assessment for each system for which funding is requested.
- 2. CONTENTS OF A PRIVACY IMPACT ASSESSMENT.
  - a. IN GENERAL. —The Director shall issue guidance to agencies specifying the required contents of a privacy impact assessment.
  - b. GUIDANCE. The guidance shall
    - i. ensure that a privacy impact assessment is commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information; and
    - ii. require that a privacy impact assessment address-
      - 1. what information is to be collected;
      - 2. why the information is being collected;
      - 3. the intended use of the agency of the information;
      - 4. with whom the information will be shared;
      - 5. what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared;
      - 6. how the information will be secured; and
      - 7. whether a system of records is being created under section 552a of title 5, United States Code, (commonly referred to as the `Privacy Act').
- 3. RESPONSIBILITIES OF THE DIRECTOR.—The Director shall
  - a. develop policies and guidelines for agencies on the conduct of privacy impact assessments;
  - b. oversee the implementation of the privacy impact assessment process throughout the Government; and
  - c. require agencies to conduct privacy impact assessments of existing information systems or ongoing collections of information that is in an identifiable form as the Director determines appropriate.

#### C. PRIVACY PROTECTIONS ON AGENCY WEBSITES. —

- 1. PRIVACY POLICIES ON WEBSITES.
  - a. GUIDELINES FOR NOTICES. —The Director shall develop guidance for privacy notices on agency websites used by the public.
  - b. CONTENTS. —The guidance shall require that a privacy notice address, consistent with section 552a of title 5. United States Code
    - i. what information is to be collected;
    - ii. why the information is being collected;
    - iii. the intended use of the agency of the information;
    - iv. with whom the information will be shared:
    - v. what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared:
    - vi. how the information will be secured: and
    - vii. the rights of the individual under section 552a of title 5, United States Code (commonly referred to as the `Privacy Act'), and other laws relevant to the protection of the privacy of an individual.
- 2. PRIVACY POLICIES IN MACHINE-READABLE FORMATS. The Director shall issue guidance requiring agencies to translate privacy policies into a standardized machine-readable format.
- D. DEFINITION. —In this section, the term `identifiable form' means any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means.

#### Attachment C

This attachment is a summary by the Federal Trade Commission of its guidance regarding federal agency compliance with the Children's Online Privacy Protection Act (COPPA).

The hallmarks of COPPA for purposes of federal online activity are (i) notice of information collection practices (ii) verifiable parental consent and (iii) access, as generally outlined below:

• Notice of Information Collection Practices

Agencies whose Internet sites offer a separate children's area and collect personal information from them must post a clear and prominent link to its Internet privacy policy on the home page of the children's area and at each area where it collects personal information from children. The privacy policy should provide the name and contact information of the agency representative required to respond to parental inquiries about the site. Importantly, the privacy policy should inform parents about the kinds of information collected from children, how the information is collected (directly, or through cookies), how the information is used, and procedures for reviewing/deleting the information obtained from children.

In addition, the privacy policy should inform parents that only the minimum information necessary for participation in the activity is collected from the child. In addition to providing notice by posting a privacy policy, notice of an Internet site's information collection practices must be sent directly to a parent when a site is requesting parental consent to collection personal information from a child. This direct notice should tell parents that the site would like to collect personal information from their child, that their consent is required for this collection, and how consent can be provided. The notice should also contain the information set forth in the site's privacy policy, or provide an explanatory link to the privacy policy.

Verifiable Parental Consent

With limited exceptions, agencies must obtain parental consent before collecting any personal information from children under the age of 13. If agencies are using the personal information for their internal use only, they may obtain parental consent through an e-mail message from the parent, as long as they take additional steps to increase the likelihood that the parent has, in fact, provided the consent. For example, agencies might seek confirmation from a parent in a delayed confirmatory e-mail, or confirm the parent's consent by letter or phone call<sup>23</sup>.

However, if agencies disclose the personal information to third parties or the public (through chat rooms or message boards), only the most reliable methods of obtaining consent must be used. These methods include: (i) obtaining a signed form from the parent via postal mail or facsimile, (ii) accepting and verifying a credit card number in connection with a transaction, (iii) taking calls from parents through a toll-free telephone

number staffed by trained personnel, or (iv) email accompanied by digital signature.

Although COPPA anticipates that private sector Internet operators may share collected information with third parties (for marketing or other commercial purposes) and with the public (through chat rooms or message boards), as a general principle, federal agencies collect information from children only for purposes of the immediate online activity or other, disclosed, internal agency use. (Internal agency use of collected information would include release to others who use it solely to provide support for the internal operations of the site or service, including technical support and order fulfillment.) By analogy to COPPA and consistent with the Privacy Act, agencies may not use information collected from children in any manner not initially disclosed and for which explicit parental consent has not been obtained. Agencies' Internet privacy policies should reflect these disclosure and consent principles.

COPPA's implementing regulations include several exceptions to the requirement to obtain advance parental consent where the Internet operator (here, the agency) collects a child's email address for the following purposes: (i) to provide notice and seek consent, (ii) to respond to a one-time request from a child before deleting it, (iii) to respond more than once to a specific request, e.g., for a subscription to a newsletter, as long as the parent is notified of, and has the opportunity to terminate a continuing series of communications, (iv) to protect the safety of a child, so long as the parent is notified and given the opportunity to prevent further use of the information, and (v) to protect the security or liability of the site or to respond to law enforcement if necessary.

Agencies should send a new notice and request for consent to parents any time the agency makes material changes in the collection or use of information to which the parent had previously agreed. Agencies should also make clear to parents that they may revoke their consent, refuse to allow further use or collection of the child's personal information and direct the agency to delete the information at any time.

#### Access

At a parent's request, agencies must disclose the general kinds of personal information they collect online from children as well as the specific information collected from a child. Agencies must use reasonable procedures to ensure they are dealing with the child's parent before they provide access to the child's specific information, e.g., obtaining signed hard copy of identification, accepting and verifying a credit card number, taking calls from parents on a toll-free line staffed by trained personnel, email accompanied by digital signature, or email accompanied by a PIN or password obtained through one of the verification methods above.

In adapting the provisions of COPPA to their Internet operations, agencies should consult the FTC's web site at http://www.ftc.gov/privacy/privacy/initiatives/childrens.html or call the COPPA compliance telephone line at (202) 326-3140.

#### Attachment D

#### **Summary of Modifications to Prior Guidance**

This Memorandum modifies prior guidance in the following ways:

- \* Internet Privacy Policies (Memorandum 99-18):
  - must identify when tracking technology is used to personalize the interaction, and explain the purpose of the feature and the visitor's option to decline it.
  - must clearly explain when information is maintained and retrieved by personal identifier in a Privacy Act system of records; must provide (or link to) a Privacy Act statement (which may be subsumed within agency's Internet privacy policy) where Privacy Act information is solicited.
  - should clearly explain an individual's rights under the Privacy Act if solicited information is to be maintained in a Privacy Act system of records; information about rights under the Privacy Act may be provided in the body of the web privacy policy or via link to the agency's published systems notice and Privacy Act regulation or other summary of rights under the Privacy Act (notice and explanation of rights under other privacy laws should be handled in the same manner).
  - when a Privacy Act Statement is not required, must link to the agency's Internet privacy policy explaining the purpose of the collection and use of the information (point-of-collection notice at agency option).

- must clearly explain where the user may consent to the collection or sharing of information and must notify users of any available mechanism to grant consent.
- agencies must undertake to make their Internet privacy policies "readable" by privacy protection technology and report to OMB their progress in that effort.
- must adhere to the regulatory requirements of the Children's Online Privacy Protection Act (COPPA) when collecting information electronically from children under age 13.

#### \*Tracking Technology (Memorandum 00-13):

- prohibition against tracking visitors' Internet use extended to include tracking by any means (previous
  guidance addressed only "persistent cookies").? authority to waive the prohibition on tracking in appropriate
  circumstances may be retained by the head of an agency, or may be delegated to (i) senior official(s)
  reporting directly to the agency head, or to (ii) the heads of sub-agencies.? agencies must report the use of
  tracking technology to OMB, identifying the circumstances, safeguards and approving official.
- agencies using customizing technology must explain the use, voluntary nature of and the safeguards applicable to the customizing device in the Internet privacy policy.
- agency heads or their designees may approve the use of persistent tracking technology to customize Internet interactions with the government.
- \* Privacy responsibilities (Memorandum 99-05)
  - agencies to identify individuals with day-to-day responsibility for implementing the privacy provisions of the E-Government Act, the Privacy Act and any other applicable statutory privacy regime.
  - agencies to report to OMB the identities of senior official(s) primarily responsible for implementing and coordinating information technology/web policies and privacy policies.
  - 1. Agencies may, consistent with individual practice, choose to extend the protections of the Privacy Act and E-Government Act to businesses, sole proprietors, aliens, etc.
  - 2. Information in identifiable form is defined in section 208(d) of the Act as "any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means." Information "permitting the physical or online contacting of a specific individual" (see section 208(b)(1)(A)(ii)(II)) is the same as "information in identifiable form."
  - 3. Clinger-Cohen Act of 1996, 40 U.S.C. 11101(6).
  - 4. Clinger-Cohen Act of 1996, 40 U.S.C. 11103.
  - 5. In addition to these statutorily prescribed activities, the E-Government Act authorizes the Director of OMB to require agencies to conduct PIAs of existing electronic information systems or ongoing collections of information in identifiable form as the Director determines appropriate. (see section 208(b)(3)(C)).
  - 6. Information in identifiable form about government personnel generally is protected by the Privacy Act of 1974. Nevertheless, OMB encourages agencies to conduct PIAs for these systems as appropriate.
  - 7. Consistent with agency requirements under the Federal Information Security Management Act, agencies should: (i) affirm that the agency is following IT security requirements and procedures required by federal law and policy to ensure that information is appropriately secured, (ii) acknowledge that the agency has conducted a risk assessment, identified appropriate security controls to protect against that risk, and implemented those controls, (iii) describe the monitoring/testing/evaluating on a regular basis to ensure that controls continue to work properly, safeguarding the information, and (iv) provide a point of contact for any additional questions from users. Given the potential sensitivity of security-related information, agencies should ensure that the IT security official responsible for the security of the system and its information reviews the language before it is posted.
  - 8. PIAs that comply with the statutory requirements and previous versions of this Memorandum are acceptable for agencies' FY 2005 budget submissions.
  - 9. Section 208(b)(1)(C).
  - 10. See 44 USC Chapter 35 and implementing regulations, 5 CFR Part 1320.8.
  - 11. Item 1 of the Supporting Statement reads: "Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information."
  - 12. Item 2 of the Supporting Statement reads: "Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information

- received from the current collection."
- 13. Item 2 of the Supporting Statement reads: "Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection."
- 14. Item 10 of the Supporting Statement reads: "Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy."
- 15. Section 208(c)(1)(B)(v).
- 16. Section 208(c)(1)(B)(vii).
- 17. Section 208(c)(1)(B)(i-iv).
- 18. When multiple Privacy Act Statements are incorporated in a web privacy policy, a point-of-collection link must connect to the Privacy Act Statement pertinent to the particular collection.
- 19. Attachment C contains a general outline of COPPA's regulatory requirements. Agencies should consult the Federal Trade Commission's COPPA compliance telephone line at (202)-326-3140 or website for additional information at: http://www.ftc.gov/privacy/privacy/initiatives/childrens.html.
- 20. Consistent with current practice, the agency head or designee may limit, as appropriate, notice and reporting of tracking activities that the agency has properly approved and which are used for authorized law enforcement, national security and/or homeland security purposes.
- 21. Section 208(c)(1)(B)(vi).
- 22. Federal Information Security Management Act of 2002 (Title III of P.L. 107-347), OMB's related security guidance and policies (Appendix III to OMB Circular A-130, "Security of Federal Automated Information Resources") and standards and guidelines development by the National Institute of Standards and Technologies.
- 23. This standard was set to expire in April 2002, at which time the most verifiable methods of obtaining consent would have been required; however, in a Notice of Proposed Rulemaking, published in the Federal Register on October 31, 2001, the FTC has proposed that this standard be extended until April 2004. 66 Fed. Reg. 54963.

# Exhibit 6





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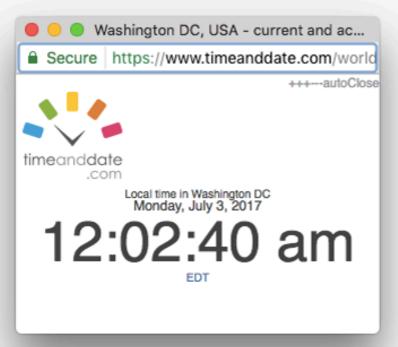




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Back to safety

# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; KRIS KOBACH, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES; OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES; GENERAL SERVICES ADMINISTRATION

Civil Action No.	

Defendants.

# CERTIFICATION BY MARC ROTENBERG IN SUPPORT OF THE PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER

Pursuant to LCvR 65.1(a) of the Rules of the United States District Court for the District of Columbia, I, Marc Rotenberg, certify that I have provided Defendants advance notice of this Emergency Motion for a Temporary Restraining Order by contacting, on the morning of Monday, July 3, 2017, Marcy Berman, Assistant Branch Director of the Federal Programs Branch, Civil Division, United States Department of Justice; Daniel Van Horn, Chief of the Civil Division in the United States Attorney's Office for the District of Columbia; and Daniel Bensing, a senior attorney in the Federal Programs Branch, Civil Division, United States Department of Justice. I have provided copies of all pleadings and papers filed in the action to Ms. Berman, who stated that she would forward said pleadings and papers to the appropriate attorney in the Federal Programs Branch.

These efforts are in addition to service to be effected on defendants by overnight mail as described in the Certificate of Service accompanying this Motion pursuant to LCvR 5.4(d).

Respectfully Submitted,

/s/ Marc Rotenberg

Marc Rotenberg, D.C. Bar # 422825 EPIC President and Executive Director

ELECTRONIC PRIVACY INFORMATION CENTER 1718 Connecticut Avenue, N.W. Suite 200 Washington, D.C. 20009 (202) 483-1140 (telephone) (202) 483-1248 (facsimile)

Dated: July 3, 2017

From: Marc Rotenberg rotenberg@epic.org

Subject: Re: TRO - EPIC v. Commission, et al (demand for state voter records)

Date: July 3, 2017 at 11:59 AM

To: Berman, Marcia (CIV) Marcia.Berman@usdoj.gov, Shapiro, Elizabeth (CIV) Elizabeth.Shapiro@usdoj.gov

Cc: Alan Butler butler@epic.org, John Davisson davisson@epic.org

Thanks, Marcy,

We will send you the TRO papers shortly and will be filing with the district court clerk this afternoon.

EPIC Senior Counsel Alan Butler is also on this matter.

-Marc Rotenberg

On Jul 3, 2017, at 11:10 AM, Berman, Marcia (CIV) < Marcia.Berman@usdoj.gov > wrote:

Hi Marc – I'm following up on this message to Dan Bensing and Dan Van Horn. You can send me the TRO papers, and I'll forward them to the appropriate attorney in Fed. Programs.

Thanks -- Marcy

Marcy Berman Assistant Branch Director U.S. Department of Justice, Civil Division Federal Programs Branch (202) 514-2205

From: Ricketts, Jennifer D (CIV)

Sent: Monday, July 03, 2017 11:06 AM

To: Berman, Marcia (CIV) < MBerman@civ.usdoj.gov >; Shapiro, Elizabeth (CIV)

<EShapiro@CIV.USDOJ.GOV>

Cc: Griffiths, John (CIV) < jgriffit@CIV.USDOJ.GOV>

Subject: FW: TRO - EPIC v. Commission, et al (demand for state voter records)

**Importance:** High

From: Van Horn, Daniel (USADC) [mailto:Daniel.VanHorn@usdoj.gov]

Sent: Monday, July 03, 2017 10:26 AM

**To:** Ricketts, Jennifer D (CIV) < <u>irickett@CIV.USDOJ.GOV</u>>

Subject: FW: TRO - EPIC v. Commission, et al (demand for state voter records)

**Importance:** High

Here's the email we just discussed:

**From:** Marc Rotenberg [mailto:rotenberg@epic.org]

Sent: Monday, July 3, 2017 10:14 AM

To: Van Horn, Daniel (USADC) < <u>DVanHorn@usa.doj.gov</u>>; Bensing, Daniel (CIV)

<<u>Daniel.Bensing@usdoj.gov</u>>

Cc: Alan Butler < butler@epic.org >; Caitriona Fitzgerald < fitzgerald@epic.org >; John Davisson

<davisson@epic.org>

**Subject:** Fwd: TRO - EPIC v. Commission, et al (demand for state voter records)

Importance: High

Daniel Van Horn, Chief Civil Division Washington, DC

Dear Mr. Van Horn,

We are forwarding a communication sent earlier today to Daniel Bensing regarding a motion we plan to file in D.D.C, seeking emergency relief, regarding the Presidential Advisory Commission on Election Integrity.

Marc Rotenberg

## Begin forwarded message:

From: Marc Rotenberg < rotenberg@epic.org >

Subject: TRO - EPIC v. Commission, et al (demand for state voter

records)

Date: July 3, 2017 at 10:09:39 AM EDT

**To:** Daniel Bensing <<u>daniel.bensing@usdoj.gov</u>>

Cc: Alan Butler < butler@epic.org>, John Davisson < davisson@epic.org>,

Caitriona Fitzgerald < fitzgerald@epic.org>

Dear Mr. Bensing,

EPIC is filing suit today against a group of agencies and defendants within the Executive Office of the President, including the Presidential Commission on Election Integrity and the Office of the Vice President. We intend to seek emergency relief and a TRO/Preliminary Injunction.

We would like to establish a line of communication with the attorney at DOJ who will be handling this matter, so that we can ensure that the Defendants have sufficient notice to appear. Can you let us know who would be the appropriate contact in your office or in the DC U.S. Attorneys office.

Sincerely,

Marc Rotenberg, President EPIC D.C. Bar # 422825 202-415-6788

### **Best Practices for GSA FACA Committee Chairpersons**

#### Background

The Federal Advisory Committee Act (FACA) 5 U.S.C., App, and implementing regulations (41 CFR 102-3) provide the basis and guidance concerning the management and operation of Federal advisory committees (FACs). Section 10(c) of the Act specifies the need for a Chair to certify meeting minutes, and Section 10 (e) requires a chair to attend each meeting of the FAC. A Chair is required for all FACs, regardless of whether a FAC is a Presidential, statutory, or discretionary committee. The Chair plays a critical role in determining the success of an advisory committee, and how well it functions (i.e., how well members work together, are engaged, provide timely written material, stay within the project scope, etc.). While serving a critical role, the Act and regulations provide very little guidance on the duties/function of a Chair. In an ideal world every FACA committee would have a strong Chair with a solid understanding of the FACA process and agency needs, but this is not always the case. The following offers insights and best practices (gathered from the FACA community) to consider when serving as a GSA FACA committee Chair.

#### Committee Chairs Wear Multiple Hats

The Chair serves as the leader of a committee and his/her attitude and work ethic greatly influence how well a committee functions. While each Chair brings their unique experience and approach to the role, all deal with similar issues and have responsibility for coordinating with different groups, including:

- Committee members (and subcommittee chairs and members, if applicable)
- DFO and committee staff
- Agency sponsor staff
- The general public (through public comments)
- Their primary employer to make the time to serve

#### Key Roles of a Committee Chair:

It is critical that the Chair and DFO work closely together throughout the entire process to keep the committee on schedule, on task, and within budgetary constraints. The Chair needs to support the DFO in his/her interactions with committee members as the Chair executes the following roles:

- Committee leader, facilitator, team builder
- Liaison between the committee and the DFO
- Manager of committee activities (including meetings) and timelines
- Key manager of committee work products

As the Committee **leader**, **facilitator**, **and team builder**, the Chair manages committee interactions and works with all of the members to create a group work product. The Chair:

- Sets expectations for committee members regarding their mission and participation on the committee
- Sets the tone for an open discussion among members
- Organizes how the committee members approach their charge (with end work product and member skills in mind) and ensures all understand the task to be completed
- Facilitates committee discussions, maintaining focus on meeting agenda items with the charge/end product in mind
- Supports the DFO in complying with FACA (members and committee activities)
- Serves in dual role as leader and member "peer," which may necessitate stepping in to help the DFO resolve issues (both administrative and technical) with difficult members
- Encourages all members to participate, diverse viewpoints, and lively (but constructive) deliberations
- Works with "difficult" committee members to understand their point of view/needs and achieve agreement on key issues

- Resolves conflict between members if discussion reaches an impasse (the Chair may choose to document dissention on an issue in the final work product if group agreement cannot be reached)
- Considers how to use group versus member-by-member voting on issues to best reach agreement within a particular committee
- Keeps members engaged in and between committee meetings

As the **liaison between the Committee and the DFO**, Chair engagement early and often with the DFO/ committee staff is critical, and may make the difference between a poorly- and well-run committee process. In fact, the planning and coordination conducted before the committee first meets is as critical to a smooth process as how well the Chair leads and facilitates the committee interactions later on. Prior to the first committee meeting the Chair should:

- Review the FACA rules governing the committee process and discuss with the DFO
- Discuss roles/responsibilities of the Chair, committee members, and agency staff with the DFO, including how to handle potential interactions with the public (public comments) and reporters
- Review the committee goals/objectives with respect to the committee members' point of view or expertise
- Develop a draft plan/timeline for organizing the committee to respond to the committee goals/objective
- Determine what background materials/presentations might be necessary from the agency sponsor
- Determine agenda items for the first committee meeting and coordinate with DFO
- Discuss with the DFO how to arrange an administrative call with the committee (not open to the public) to
  make sure members understand how logistics are handled for conference calls and face-to-face meetings;
  how travel is arranged (if applicable) and how they are reimbursed for travel expenses; discuss member
  expectations and interactions with the public/reporters; discuss overall process for committee meetings;
  and discuss FACA rules and procedures.

As the **manager of committee activities/timelines**, the Chair has the opportunity to frame the issues for the committee and set the tone for committee discussions. Under FACA, public meetings are the one time when all members are together and can speak openly, so it is important to have some flexibility on the agenda to allow for ample discussion and vetting of issues, while also using the time productively so members feel their time is well spent. Best practices for the first public committee meeting include:

- Introduce members/ensure they are clearly identified (webcast considerations)
- Describe expectations for the committee as a whole/potential issues for discussion
- Conduct the meeting according to a previously approved agenda
- Manage the agenda and speaker timeslots to keep the meeting moving
- Discuss the committee timeline, milestones, and agree on writing assignments
- Invite agency sponsors to provide the context for the committee mission and answer questions
- Discuss audience/general outline for final work product and how/when the first draft will be developed
- Recap the meeting noting what was accomplished, the next steps, and any action items

As the committee leader, the Chair is the natural **key manager of committee work products**. This can be a challenging task for a Chair if members don't contribute the necessary material in a timely manner, and support from a Vice-Chair can be a big asset to the Chair at this time. To help manage work products the Chair should:

- Get early agreement from members on the work product overall structure and general content (and revisit
  as the committee deliberates during public meetings), as well as how to handle potential dissention in the
  work product/recommendations
- Take the lead in revising the first draft (consistent with committee discussions)
- If a work product is initially generated by a subcommittee, remind members that the work product must be fully vetted by the parent committee, which could result in significant changes to the end product
- Ensure the work product: responds to the full mission; is constructive; clearly identifies any recommendations; and provides substantive basis for findings, conclusions, and recommendations

#### **CHARTER**

#### PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY

- 1. **Committee's Official Designation**. Presidential Advisory Commission on Election Integrity ("Commission").
- 2. **Authority**. The Commission is established in accordance with Executive Order 13799 of May 11, 2017, "Establishment of a Presidential Advisory Commission on Election Integrity," ("Order") and the provisions of the Federal Advisory Committee Act ("FACA"), as amended (5 U.S.C. App.).
- 3. **Objectives and Scope of Activities**. The Commission will, consistent with applicable law and the Order, study the registration and voting processes used in Federal elections. The Commission shall be solely advisory and shall submit a report to the President of the United States ("President") that identifies the following:
  - a. those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections;
  - b. those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of voting processes used in Federal elections; and
  - c. those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting.
- 4. **Description of Duties**. The Commission will function solely as an advisory body.
- 5. **Agency or Official to Whom the Committee Reports**. The Commission shall provide its advice and recommendations to the President.
- 6. **Agency Responsible for Providing Support**. The General Services Administration ("GSA") shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission, to the extent permitted by law and on a reimbursable basis. However, the President's designee will be responsible for fulfilling the requirements of subsection 6(b) of the FACA.
- 7. **Estimated Annual Operating Costs and Staff Years**. The estimated annual costs to operate the Commission are approximately \$250,000 in FY2017 and approximately \$250,000 in FY2018, as needed, including approximately three full-time equivalent employees (FTEs) over the duration of the Commission.
- 8. **Designated Federal Officer**. Pursuant to 41 CFR § 102-3.105 and in consultation with the chair of the Commission, the GSA Administrator shall appoint a full-time or part-time federal employee as the Commission's Designated Federal Officer ("DFO"). The DFO will approve or

call all Commission meetings, prepare or approve all meeting agendas, attend all Commission meetings and any subcommittee meetings, and adjourn any meeting when the DFO determines adjournment to be in the public interest. In the DFO's discretion, the DFO may utilize other Federal employees as support staff to assist the DFO in fulfilling these responsibilities.

- 9. **Estimated Number and Frequency of Meetings**. Meetings shall occur as frequently as needed, called, and approved by the DFO. It is estimated the Commission will meet five times at a frequency of approximately 30-60 days between meetings, subject to members' schedules and other considerations.
- 10. **Duration and Termination**. The Commission shall terminate no more than two (2) years from the date of the Executive Order establishing the Commission, unless extended by the President, or thirty (30) days after it presents its final report to the President, whichever occurs first.

#### 11. Membership and Designation.

- (a) The Vice President shall chair the Commission, which shall be composed of not more than fifteen (15) additional members.
- (b) Members shall be appointed by the President of the United States and shall include individuals with knowledge and experience in elections, election management, election fraud detection, and voter integrity efforts, and any other individuals with knowledge or experience determined by the President to be of value to the Commission. Members of the Commission may include both regular Government Employees and Special Government Employees.
- (c) The Vice President may select a Vice Chair from among those members appointed by the President, who may perform the duties of the chair if so directed by the Vice President. The Vice President may also select an executive director and any additional staff he determines necessary to support the Commission.
- (d) Members of the Commission will serve without additional compensation. Travel expenses will be allowed, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service (5 U.S.C. 5701-5707), consistent with the availability of funds.
- 12. **Subcommittees**. The Chair of the Commission, in consultation with the DFO, is authorized to create subcommittees as necessary to support the Commission's work. Subcommittees may not incur costs or expenses without prior written approval of the Chair or the Chair's designee and the DFO. Subcommittees must report directly to the Commission, and must not provide advice or work products directly to the President, or any other official or agency.
- 13. **Recordkeeping**. The records of the Commission and any subcommittees shall be maintained pursuant to the Presidential Records Act of 1978 and FACA.
- 14. **Filing Date**. The filing date of this charter is June 23, 2017.

# UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

ARTHENIA JOYNER; MIKE SUAREZ; JOSHUA A. SIMMONS; BRENDA SHAPIRO; LUIS MEURICE; THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.; FLORIDA IMMIGRANT COALITION, INC., Plaintiffs.

versus

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY: MICHAEL PENCE, in his official capacity as Chair of the Presidential Advisory Commission on Election Integrity; KRIS KOBACH, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES; EXECUTIVE OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES; TIM HORNE, in his official capacity as Administrator of the General Services Administration; MICK MULVANEY. in his official capacity as Director, Office of Management and Budget; KEN DETZNER, in his official capacity as Florida Secretary of State, Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF, WITH REQUEST FOR EXPEDITED TREATMENT

### I. PRELIMINARY STATEMENT

- 1. This action is brought on behalf of Florida voters and organizations involved and interested in the fair conduct of elections in Florida and elsewhere throughout the United States. This litigation challenges the legality of the actions of the Presidential Advisory Commission on Election Integrity and the legality of its directive requesting voter registration information of state-registered voters in Florida and throughout the United States.
- 2. This suit proceeds pursuant to the Administrative Procedure Act ("APA") (5 U.S.C. §§ 551-706), the Federal Advisory Committee Act ("FACA") (5 U.S.C. app. 2), the Paperwork Reduction Act ("PRA") (44 U.S.C. § 3501), the Declaratory Judgment Act (28 U.S.C. § 2201, et seq.), and the United States Constitution, seeking injunctive and declaratory relief, and other appropriate relief to prevent the unauthorized collection of state voter information data and to prohibit the Florida Secretary of State and other similarly situated officials of other states from providing state voter data to the Presidential Advisory Commission on Election Integrity (the "Presidential Advisory Commission" or "Commission") and any other person or entity acting

pursuant to the request or directives of the Presidential Advisory Commission.

3. At issue in this lawsuit is the request by the Presidential Advisory Commission to collect, aggregate, and potentially disseminate a massive volume of state-maintained voter information, including personal identification information and private data that citizens are required by law to furnish to state officials solely to pursue their First Amendment constitutional right to vote. The challenged requests made to state elections officials infringe voters' First Amendment rights. The requests also constitute an unjustified invasion of privacy not authorized under the Constitution and laws of the United States or the individual states. The actions of the Presidential Advisory Commission have occurred in the absence of a required Privacy Impact Assessment. Importantly, the Presidential Advisory Commission's request for voter information preceded any authorized meeting of the Commission.

## II. JURISDICTION, STANDING, AND VENUE

4. This court has jurisdiction under its general federal question jurisdiction, 28 U.S.C. § 1331, and specific jurisdiction over claims arising under the Administrative Procedure Act, 5 U.S.C. §§ 702 & 704.

- 5. The Court has jurisdiction over claims for violations of the Paperwork Reduction Act. See Livestock Mktg. Ass'n v. U.S. Dep't of Agriculture, 132 F. Supp. 2d 817, 831 (D.S.D. 2001); see also Alabama-Tombigbee Rivers Coal. v. Dep't of Interior, 26 F. 3d 1103 (11th Cir. 1994) (holding that "[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction" because it is inappropriate "to allow the government to use the product of a tainted procedure" in violation of federal statutes) (internal citation omitted)).
- 6. The Declaratory Judgment Act (28 U.S.C. § 2201) authorizes courts to issue declaratory judgments.
  - 7. This court has personal jurisdiction over all defendants.
- 8. Plaintiffs have standing to commence this action under the Administrative Procedure Act ("APA"), which confers standing to any party adversely affected by government action. 5 U.S.C. § 702 (1988).
- 9. Plaintiffs also have standing pursuant to the Federal Advisory Committee Act (5 U.S.C. app. 2). *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1080–81 (11th Cir. 2002).

- 10. The Plaintiffs are authorized to seek compliance with the Separation of Powers. *Id*.
- 11. Plaintiffs have standing for a private cause of action for violation of the Paperwork Reduction Act of 1995, in that, "[t]he protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." (emphasis added). 44 U.S.C. § 3512(b); see also Livestock Mktg. Ass'n, 132 F. Supp. 2d at 831 (holding that there is a private right of action under the Paperwork Reduction Act because the court "[could] not imagine language that would be more expansive.").
- 12. Plaintiffs' privacy interests are also adversely affected by the federal government action that is the subject of this complaint.
- 13. Venue is proper in the Southern District of Florida under 5 U.S.C. § 703 and 28 U.S.C. § 1391 as a place where the challenged conduct is occurring with respect to Florida voters.
- 14. All conditions precedent to bringing this action have occurred, have been waived, or would be a useless act and are accordingly waived.

### III. PARTIES

- Plaintiff Senator Arthenia Joyner (retired), is a resident and 15. voter of Hillsborough County, Florida, and a member in good standing of The Florida Bar. She sues in her individual capacity. Senator Joyner formerly served as a member of the Florida House of Representatives, representing the 59th House District from 2000 through 2006, and as a member of the Florida Senate representing the 19th Senate District from 2006 through 2016. As a member of the Florida Senate from 2014 through 2016, Senator Joyner served as the Florida Senate Minority Leader. Senator Joyner has long been a passionate advocate for civil rights and justice during the entirety of her political and legal careers, and within her private life. Senator Joyner is concerned about the disclosure of private information and how such disclosures may violate the law and the civil rights of all people. She opposes the dissemination, collection, and potential distribution of her voter and identity information.
- 16. Plaintiff Councilman Mike Suarez, is a resident and voter of Hillsborough County, Florida. He sues in his individual capacity. Councilman Suarez represents District 1 in the Tampa (Florida) City

Council and is the immediate past Chair of the Tampa City Council, having served in that position from 2016 through 2017. Councilman Suarez is a third-generation Tampa resident who is concerned about the protection of personal voter and identification information and privacy rights for himself as a registered voter, and for his constituents throughout the City of Tampa. He opposes the dissemination, collection, and potential distribution of his voter and identity information.

- 17. Plaintiff Joshua A. Simmons is a resident and voter in Broward County, Florida, in the Southern District of Florida. He sues in his individual capacity. He opposes the dissemination, collection, and potential distribution of his voter and identity information.
- 18. Plaintiff Brenda Shapiro is a resident and voter in Miami-Dade County, Florida, in the Southern District of Florida. She sues in her individual capacity. She is an active voter, a practicing attorney, and has been a leader in civic affairs in Miami, where she has served as Chair of both the City of Miami's Community Relations Board and the City of Miami's Civilian Investigative Panel. She is concerned about the circulation of her voting history and her personal information, and she is especially concerned about the misuse of that information. She

opposes the dissemination, collection, and potential distribution of her voter and identity information.

- 19. Plaintiff Luis Meurice is a resident and voter in Miami-Dade County, Florida, in the Southern District of Florida. He is a 38-year member of the International Longshoremen's Association, its Florida Legislative Director, and President of ILA Local 2062. He is also District Vice President of South Florida AFL-CIO. He is active in Movimiento Democracia, a non-profit organization advocating for freedom and democracy for all people. He sues in his individual capacity. He opposes the dissemination, collection, and potential distribution of his voter and identity information.
- 20. Plaintiff The American Civil Liberties Union of Florida, Inc. ("ACLU of Florida" or "ACLU") is a non-profit, §501(c)(3) membership organization. The ACLU is dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws, including laws protecting access to the right to vote. Since 1965, the ACLU, through its Voting Rights Project, has litigated more than 300 voting rights cases and has a direct interest in ensuring that all eligible citizens are able to access the franchise and are not removed from voter

rolls, and in empowering those targeted by vote suppression. The ACLU of Florida is a state affiliate of the national American Civil Liberties Union and is domiciled in the State of Florida, with its principal place of business in Miami-Dade County, Florida, within the Southern District of Florida. The ACLU of Florida has over 50,000 members and has litigated numerous cases, either through direct representation or as amicus curiae, to protect the fundamental right to vote.

- 21. Plaintiff Florida Immigrant Coalition, Inc. ("FLIC") is a non-profit membership organization and coalition of more than 65 membership organizations and over 100 allies. FLIC was founded in 1998 and formally incorporated in 2004. More than an organization, "FLIC" is a strategic multi-racial, intergenerational social movement working for the fair treatment of all people, including immigrants. FLIC is domiciled in the State of Florida, with its principal place of business in Miami-Dade County, Florida, within the Southern District of Florida. Its members are residents of Florida and elsewhere.
- 22. Defendant Presidential Advisory Commission is an advisory commission of the United States government within the meaning of the Federal Advisory Committee Act (5 U.S.C. app. 2 § 10). It is a

subcomponent of the Executive Office of the President of the United States. The Office of Management and Budget and the General Services Administration, along with the Presidential Advisory Commission are agencies or the equivalent thereof within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.

- 23. Defendant Michael Pence is the Vice President of the United States and the Chair of the Presidential Advisory Commission. He is sued in his official capacity as Chair of the Presidential Advisory Commission.
- 24. Defendant Kris Kobach is the Secretary of State of Kansas, and the Vice Chair of the Presidential Advisory Commission. Vice Chair Kobach has a lengthy history of attempting to suppress the right to vote within his home state of Kansas. For example, in *League of Women Voters of United States v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016), the U.S. Court of Appeals for the District of Columbia Circuit rejected Secretary Kobach's arguments that proof of citizenship should be required when registering to vote because there is "precious little record evidence" that failure to present citizenship leads to fraudulent registration by non-citizens. Similarly, in *Fish v. Kobach*, 840 F.3d 710

(10th Cir. 2016), the U.S. Court of Appeals for the Tenth Circuit upheld the district court's injunction against Secretary Kobach, requiring him to register voters whose voter registrations were rejected for failure to provide documentary proof of citizenship. The Tenth Circuit explained that Mr. Kobach's actions and the Kansas statutory scheme amounted to a "mass denial of a fundamental constitutional right" for more than 18,000 voters. Moreover, the Tenth Circuit explained that Secretary Kobach's "assertion that the 'number of aliens on the voter rolls is likely to be in the hundreds, if not thousands' is pure speculation." *Id.* at 755. He is sued in his official capacity as Vice Chair of the Presidential Advisory Commission.

- 25. Defendant Executive Office of the President of the United States ("EOP") is an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.
- 26. Defendant Office of the Vice President of the United States ("OVP") is a subcomponent of EOP and constitutes an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.
- 27. Defendant Tim Horne is the Administrator of the U.S. General Services Administration ("GSA"), an agency within the

meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701. The GSA is charged with providing the Presidential Advisory Commission "such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission ...." (Exhibit A). Exec. Order. No. 13,799, 82 Fed. Reg. 22,389, 22,390 (May 11, 2017). He is sued in his official capacity.

- 28. Defendant Mick Mulvaney is the Director of the Office of Management and Budget ("OMB"), an office within the Executive Office of the President of the United States. The OMB Director reports to the President, Vice President, and the White House Chief of Staff. The OMB is tasked with promulgating the Federal Regulations to effectuate the mandates of the Paperwork Reduction Act. He is sued in his official capacity.
- 29. Defendant Ken Detzner is the Florida Secretary of State, charged with the statutory responsibilities of maintaining and securing Florida voter information. He is sued in his official capacity.

#### IV. FACTS

## The President and His Administration Propagate Baseless Accusations About Widespread Voter Fraud

- 30. President Trump has a long history of propagating baseless conspiracy theories about voter fraud, ostensibly in order to suppress the right to vote. As a presidential candidate and now as President, Mr. Trump repeatedly, and baselessly, spoke about widespread voter fraud across the country, including supposed votes cast by dead people, people voting multiple times, people voting in multiple states, and, supposed votes cast by "illegal immigrants."
- 31. In August 2016, then-Candidate Trump told an audience that:

The only way they can beat me, in my opinion, and I mean this 100 percent, is if in certain sections of the state, they cheat, OK... So I hope you people can sort of not just vote... (but also) go around and look and watch other polling places and make sure that it's 100 percent fine.

Sachelle Saunders, Donald Trump wants to fight voter fraud with observers, Orlando News 6 (August 17, 2017), http://www.clickorlando.com/news/politics/trumps-call-for-poll-

<sup>&</sup>lt;sup>1</sup> Attached as Exhibit B is a compilation of public statements by or on behalf of the President promoting the existence of voter fraud in connection with the 2016 election, despite no legitimate supportive facts or evidence.

observers-could-cause-trouble. Similarly, on October 1, 2017, then-Candidate Trump told an audience to:

watch your polling booths because I hear too many stories about Pennsylvania, certain areas. . . . We can't lose an election because of, you know what I'm talking about.

Robert Farley, *Trump's Bogus Voter Fraud Claims*, FactCheck.org (October 19, 2016), http://www.factcheck.org/2016/10/trumps-bogus-voter-fraud-claims/. These are just two examples, of many, of Mr. Trump encouraging people to go to polling sites to intimidate voters.

32. As another example, on October 17, 2016, then-Candidate Trump stated:

They even want to try to rig the election at the polling booths. And believe me, there's a lot going on. Do you ever hear these people? They say there's nothing going on. People that have died 10 years ago are still voting. Illegal immigrants are voting. I mean, where are the street smarts of some of these politicians? ... So many cities are corrupt, and voter fraud is very, very common.

Tribune news services, Trump wrongly insists voter fraud is 'very, very common,' Chicago Tribune (Oct. 17, 2016), http://www.chicagotribune.com/news/nationworld/politics/ct-donald-trump-voter-fraud-20161017-story.html.

33. On November 27, 2016, shortly after the election, the President-Elect continued his baseless accusations about voter fraud, claiming without evidence that he actually won the national popular vote if "illegal" votes were deducted from the total. The President-Elect tweeted:

In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.

Donald J. Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 3:30 p.m.), https://twitter.com/realDonaldTrump/status/802972944532209 664. ABC News declared this statement "False," because "Trump offered no proof to back up this claim, and ABC News, which monitored all 50 states for voting irregularities on election night, has found no evidence of widespread voter fraud."

34. Soon after the inauguration, on January 25, 2017, President Trump tweeted:

I will be asking for a major investigation into VOTER FRAUD, including those registered to vote in two states, those who are illegal and....

even, those registered to vote who are dead (and many for a long time). Depending on results, we will strengthen up voting procedures!

- Donald J. Trump (@realDonaldTrump), Twitter (Jan. 25, 2017, 7:10 am), https://twitter.com/realDonaldTrump/status/824227824903090176; Donald J. Trump (@realDonaldTrump), Twitter (Jan. 25, 2017, 7:13 am), https://twitter.com/realDonaldTrump/status/824228768227217408.
- 35. With these tweets, the President stated his intention to create what would later become the Presidential Advisory Commission.

# The Presidential Advisory Commission Attempts to Collect State Voter Information

- 36. The Presidential Advisory Commission was established by Executive Order No. 13,799 on May 11, 2017 (the "Executive Order"). 82 Fed. Reg. 22,389 (Exhibit A). Its Charter is attached as Exhibit C.
- 37. The Executive Order instructs the Presidential Advisory Commission to "study the registration and voting processes used in Federal elections." (Exhibit A). 82 Fed. Reg. at 22,389. The Executive Order does not contain any authority to collect personal voter data, to initiate investigations, or to seek the disclosure of state voter data.
- 38. On June 28, 2017, the Vice Chair of the Commission initiated a process to collect detailed voter information, including personal identifying information, from all 50 States and the District of Columbia. This request had never occurred before, notwithstanding the

existence of the U.S. Election Assistance Commission created by the Help America Vote Act of 2002. 52 U.S.C. §§ 20921-20930.<sup>2</sup>

- 39. Prior to all of the Presidential Advisory Commission's members being publicly named and sworn in, and before any duly noticed meetings, Vice Chair Kobach stated during a phone call with Presidential Advisory Commission members that "a letter w[ould] be sent today to the 50 States and District of Columbia on behalf of the Commission requesting publicly-available data from state voter rolls. . . . " (Exhibit D). Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017).
- 40. According to the U.S. Census, state voter rolls include the names, addresses, and other personally identifiable information of as many as 157 million registered voters nationwide. U.S. Census Bureau, Voting and Registration in the Election of November 2016 at tbl. 4a

<sup>&</sup>lt;sup>2</sup> The U.S. Election Assistance Commission is empowered to conduct periodic studies of election administration including, among other things "[n]ationwide statistics and methods of identifying, deterring, and investigating voting fraud in elections for Federal office" and "[m]ethods of voter registration, maintaining secure and accurate lists of registered voters (including the establishment of a centralized, interactive, statewide voter registration list linked to relevant agencies and all polling sites), and ensuring that registered voters appear on the voter registration list at the appropriate polling site." 52 U.S.C. § 20981.

(May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

- 41. Florida law makes certain voter information confidential and exempt from disclosure under any circumstances. Social security numbers, driver's license numbers, and the source of voter registration application cannot be released under any circumstances. § 97.0585, Florida Statutes (2016). Additionally, other voter information is confidential under certain circumstances. For instance, victims of domestic violence and stalking who are participants in the Attorney General's Address Confidentiality Program are exempt from public disclosure of voter registration information. § 97.0585(3). Also, categories of high-risk professionals can be exempt from disclosure of personal information including address, photograph, and date of birth.
- 42. The Florida Department of State, Division of Elections, is required to redact all protected exempt information for any requests for production of voter information.

- 43. One of the Vice Chair's letters, dated June 28, 2017, was sent to Florida Secretary of State Ken Detzner. (Exhibit E).<sup>3</sup>
- 44. These letters include a request for voter identifying information, including the "full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information." *Id.*

<sup>&</sup>lt;sup>3</sup> That same day of June 28, 2017, the U.S. Department of Justice sent a letter to every state covered by the National Voter Registration Act, 52 U.S.C. § 20501 ("NVRA") seeking "all statutes, regulations, written guidance, internal policies, or database user manuals that set out the procedures" each state has relating to various programs including, among other things, removing voters from voter registration rolls. The letter also discusses coordination between "state voter registration lists with state agency records on felony status and death." However, the DOJ letter does not appear to specifically request information about specific identifiable voters. A copy of the letter sent to Washington Secretary of State Kim Wyman is attached as Exhibit F and is believed to be representative of the letters to all states covered by the NVRA. Given the nearly identical timing and subject matter of the DOJ's letter and the Presidential Advisory Commission's letter, it appears that the Presidential Advisory Commission exists to obtain records that would be otherwise unavailable to the DOJ for the purpose of enacting policies and procedures to suppress the vote across the entire country.

- 45. The Vice Chair's letters also sought "[w]hat evidence or information [the state had] regarding instances of voter fraud or registration fraud" and "[w]hat convictions for election related crimes ha[d] occurred in [the] state since the November 2000 federal election." (Exhibit E).
- 46. According to the Presidential Advisory Commission, "any documents that are submitted to the full Commission w[ould] also be made available to the public." (Exhibit E).
- 47. According to the letters, the states' responses to the Presidential Advisory Commission are due by July 14, 2017. (Exhibit E).
- 48. The letter does not list a physical address for the Presidential Advisory Commission, leading some states, including Florida, to address the written response to the Vice Chair at his state government address in Topeka, Kansas. Withholding a physical address from the Commission's correspondence leads to records being produced at a location other than the federally identified address of the Presidential Advisory Commission.

49. The URL (https://safe.amrdec.army.mil/safe/Welcome.aspx) provided by the Presidential Advisory Commission for the transmission of voter registration data and information is a non-secure site, subjecting voters to having personal identifying information made available on the Internet and thus making them potential victims of identity theft. Visitors to this URL are informed that the "connection is not secure" and are warned about "your information . . . being stolen." (Exhibit G).

## Florida Leads the Nation in Fraud and Identity Theft, Making it Especially Imperative that Personal Voter Data be Secure

- 50. The procedures being employed by the Presidential Advisory Commission and the other federal Defendants leave the Plaintiffs and, in the case of the organizational Plaintiffs, their members, open to fraud and identity theft.
- 51. Florida leads the country in complaints for fraud and identity theft, and has for more than a decade. Maria LaMagna, Residents of these states are most vulnerable to identity theft, Market Watch (July 9, 2017), http://www.marketwatch.com/story/residents-of-these-states-are-most-vulnerable-to-identity-theft-2017-07-07; William E. Gibson & Donna Gehrke-White, Florida leads nation in fraud, ID

theft, South Florida Sun-Sentinel (Mar. 3, 2015), http://www.sun-sentinel.com/news/florida/fl-florida-leading-fraud-id-theft-20150303-story.html. Additionally, among metropolitan areas across the United States, South Florida produces the most cases of fraud and identity theft. *Id*.

- 52. The federal Defendants' actions will serve to further compound this problem if the states transmit the requested voter data to the Presidential Advisory Commission.
- 53. Florida officials stated, in response to media inquiries about possible data breaches during the 2016 election, that "Florida's online elections databases and voting systems remained secure in 2016," and Florida has "secured its databases and put in firewalls to protect information, and the state has 'no indication that any unauthorized access occurred." Jeff Pegues, Election databases in several states were at risk during 2016 presidential campaign, CBS News (June 13, 2017), http://www.cbsnews.com/news/election-databases-in-several-states-were-at-risk-during-2016-presidential-campaign/.
- 54. Florida is also in the process of implementing a new online voter registration platform. There has been considerable legislative

debate about the platform's implementation, specifically to address security concerns to protect the public. Amy Sherman, *Is online voter registration more secure? Florida state senator says yes*, Politifact (Jan. 23, 2015), http://www.politifact.com/florida/statements/2015/jan/23/jeff-clemens/online-voter-registration-more-secure-florida-stat/.

55. Florida's efforts to secure voter registration data and, therefore, its voters (including the Plaintiffs), from among other things, identity theft, will be undermined if personalized voter data is amassed and centralized into a non-secure federal database, as requested by the Presidential Advisory Commission.

# Opposition by States to Presidential Advisory Commission's Demand for Voter Identifying Information

At the present time, numerous state elections officials have 56. publicly announced their intention to oppose the demand for personal voter data. Philip Bump & Christopher Ingraham, Trump Says States Are "Trying to Hide Things" from His Voter Fraud Commission. Here's What The ySay, Wash. Post (July Actually 1, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/01/trumpsays-states-are-trying-tohide-things-from-his-voter-fraud-commissionheres-what-they-actually-say/.

- 57. California Secretary of State Alex Padilla announced his state would "not provide sensitive voter information to a committee that has already inaccurately passed judgment that millions of Californians voted illegally. California's participation would only serve to legitimize the false and already debunked claims of massive voter fraud . . . ." Press Release, Secretary of State Alex Padilla Responds to Presidential Election Commission Request for Personal Data of California Voters (June 29, 2017), http://www.sos.ca.gov/administration/news-releases-and-advisories/2017-news-releases-and-advisories/secretary-state-alex-padilla-responds-presidential-election-commission-request-personal-data-california-voters/.
- 58. Kentucky Secretary of State Alison Lundergan Grimes stated that "Kentucky w[ould] not aid a commission that is at best a waste of taxpayer money and at worst an attempt to legitimize voter suppression efforts across the country." Bradford Queen, Secretary Grimes Statement on Presidential Election Commission's Request for Voters' Personal Information, Kentucky (last accessed July 3, 2017) http://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prld=129.

- 59. Virginia Governor Terry McAuliffe had "no intention of honoring [the] request." Terry McAuliffe, *Governor McAuliffe Statement* on Request from Trump Elections Commission (June 29, 2017), https://governor.virginia.gov/newsroom/newsarticle?articleid=20595.
- Mississippi Secretary of State Delbert Hosemann said, of the 60. Vice Chair's letter: "My reply would be: They can go jump in the Gulf of Mexico, and Mississippi is a great state to launch from. Mississippi residents should celebrate Independence Day and our state's right to protect the privacy of our citizens by conducting our own electoral processes." Tal Kopan, Pence-Kobach voting commission alarms states with info request, CNN (July 1, 2017), http://www.cnn.com/2017/06/30/politics/kris-kobach-voter-commissionrolls/index.html.
- 61. Despite several requests directed to the Florida Secretary of State to determine the State of Florida's position regarding the Presidential Advisory Commission request, Florida's Secretary of State only on the evening of July 6, 2017, announced that Florida will comply with the request by producing only publicly available information. Associated Press, Florida to hand over some voting information to

commission investigating voter fraud, Local 10 South Florida (July 6, 2017), https://www.local10.com/news/politics/florida-to-hand-over-some-voting-information-to-commission-investigating-voter-fraud. As of the time of this filing, Plaintiffs have no reason to believe the requested information has yet been provided to the Presidential Advisory Commission by the State of Florida. Nor is it clear exactly what voter information the State of Florida intends to transmit to the Commission. The Florida Secretary of State's letter confirming Florida's intention to produce voter information is attached as Exhibit H.

- 62. Public opposition to the Presidential Advisory Commission's request is mounting. Voting technology professionals wrote state election officials to warn that "[t]here is no indication how the information will be used, who will have access to it, or what safeguards will be established." Letter from EPIC to Nat'l Ass'n of State Sec'ys (July 3, 2017), https://epic.org/privacy/voting/pacei/Voter-Privacy-letter-to-NASS-07032017.pdf.
- 63. After public opposition to the Presidential Advisory Commission's request began to mount, the Vice Chair wrote an article for Breitbart News, in which he conceded that "information like the last

four numbers of a voter's social security number" is "private," but that "[t]he Commission didn't request that information. Thus, there is no threat that the Commission's work might compromise anyone's privacy." Kris W. Kobach, Kobach: Why States Need to Assist the Presidential Commission on Election Integrity, Brietbart News (July 3, 2017), http://www.breitbart.com/big-government/2017/07/03/kobach-why-states-need-to-assist-the-presidential-commission-on-election-integrity/. (Exhibit I). To the contrary, the Vice Chair's June 28, 2017 letter to the 50 States and the District of Columbia specifically requests, among other things, the "last four digits of social security number[s]." (Exhibit E).

64. The President also responded to the news that numerous states were objecting to the production of voter data to the Presidential Advisory Commission, tweeting:

Numerous states are refusing to give information to the very distinguished VOTER FRAUD PANEL. What are they trying to hide?

Donald J. Trump (@realDonaldTrump), Twitter (July 1, 2017, 6:07am), https://twitter.com/realDonaldTrump/status/881137079958241280.

### **Absence of Privacy Impact Assessment**

- 65. Under the E-Government Act of 2002 (18 Pub. L. 107-347, 116 Stat. 2899 (codified as amended at 44 U.S.C. § 3501 note)), every agency "initiating a new collection of information that (I) will be collected, maintained, or disseminated using information technology; and (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual" is required to complete a Privacy Impact Assessment ("PIA") before initiating such collection. 44 U.S.C. § 3501 note ("Privacy Impact Assessments").
- 66. The agency must "(i) conduct a privacy impact assessment; (ii) ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and (iii) if practicable, after completion of the review under clause (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means." *Id*.
- 67. The Presidential Advisory Commission is an agency subject to the E-Government Act because it is an "establishment in the

executive branch of the Government," a category that "includ[es] the Executive Office of the President." 44 U.S.C. § 3502(1).

- 68. A Privacy Impact Assessment for a "new collection of information" must be "commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information." § 3501 note ("Privacy Impact Assessments"). The PIA must specifically address "(I) what information is to be collected; (II) why the information is being collected; (III) the intended use of the agency of the information; (IV) with whom the information will be shared; (V) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared; [and] (VI) how the information will be secured ...." Id.
- 69. Under FACA, "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [an] advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the

agency to which the advisory committee reports until the advisory committee ceases to exist." 5 U.S.C. app. 2 § 10(b).

- 70. The Commission has not conducted a Privacy Impact Assessment for its collection of state voter data.
- 71. The Commission has not ensured review of a PIA by any Chief Information Officer or equivalent official.
- 72. The Commission has not published a PIA or made such an assessment available for public inspection.
- 73. The U.S. Congress has made no finding of a problem that would warrant creation of a nationwide voter database. There has been no congressional finding of a systemic and nationwide problem with voter registration files and voter history, including evidence of voter fraud, to justify the collection of state voter history and voter registration information by the federal government.

#### **COUNT I**

Violations of the Federal Advisory Committee Act, 5 U.S.C. App. 2, et seq.

Against Presidential Advisory Commission, Pence, Kobach, Executive Office of the President, Executive Office of the Vice President, Horne, and Mulvaney

- 74. Plaintiffs restate and incorporate paragraphs 1-73.
- 75. The Executive Order specifically contemplates that the Presidential Advisory Commission is governed by the Federal Advisory Committee Act, 5 U.S.C. App. 2, et seq. ("FACA"). See Executive Order 82 Fed. Reg. 22,389 at § 7(c) (Exhibit A). The Presidential Advisory Commission's Charter also states that the Commission "is established in accordance with . . . the Federal Advisory Committee Act[.]" (Exhibit C at ¶ 2). The first notice of any meeting of the Presidential Advisory Commission published in the Federal Register, which was published on July 5, 2017, also states that the Commission was "established in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. . . . " 82 Fed. Reg. 31,063 (Exhibit J) (the "First Meeting Notice").
- 76. However, Defendant Presidential Advisory Commission and the other federal Defendants have failed to comply with numerous of the FACA's clear requirements. Among other things, these Defendants

- (a) failed to properly notice and conduct meetings, (b) failed to provide opportunities for public participation and input, (c) failed to make its membership fully known, (d) failed to make documents available to the public, and (e) conducted unlawful business not authorized by the Executive Order or any statute prior to all of the Commission's members being appointed and sworn in and without input or participation from the public or even most of the Commission's members.
- 77. "Because FACA's dictates emphasize the importance of openness and debate, the timing of such observation and comment is crucial to compliance with the statute. Public observation and comment must be contemporaneous to the advisory committee process itself. . . . If public commentary is limited to retrospective scrutiny, the Act is rendered meaningless." See Alabama-Tombigbee Rivers Coal. v. Dep't of Interior, 26 F.3d 1103, 1106 (11th Cir. 1994).
- 78. According to the Eleventh Circuit, "injunctive relief [is] the only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements." *Id.* at 1107. It is the responsibility of the courts to see that the FACA is followed, even where

there are only "minor transgressions" of the FACA and where "the subject matter is serious" and "the objective is worthy." *Id.* at n.9. "Because the matters are so serious and of such great concern to so many with differing interests, it is absolutely necessary that the procedures established by Congress be followed to the letter." *Id.* 

- 79. "[T]o allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act." *Id*.
- 80. First, the Presidential Advisory Commission and the other federal Defendants, including the Vice President and the Vice Chair on behalf of the Commission, began conducting official business prior to ever holding a meeting for which a notice was published in the Federal Register, prior to the appointment and swearing in of all of its members, and prior to any public participation or input being permitted.
- 81. The first meeting of the Commission for which a notice was published in the Federal Register is presently scheduled to take place on July 19, 2017. At that meeting, the Commission's members will be sworn in.

- 82. Yet, on June 28, 2017, the Vice Chair issued letters to the chief elections officials of all 50 States and the District of Columbia seeking personal information about every registered voter in the country, the effect of which would be to amass and centralize a federal voter database not authorized by the Executive Order or any statute, thereby indicating one or more earlier meetings of the Commission have taken place without any notice published in the Federal Register.
- 83. According to the Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017), attached as Exhibit D, additional telephonic meetings, for which there was no notice published in the Federal Register, were unlawfully held. During the conference call with the Commission's members, the Vice Chair told the other members about the letters he sent to the 50 States and the District of Columbia on behalf of the Commission requesting voter data.
- 84. Thus, the Vice President and the Vice Chair acted unilaterally on behalf of the Presidential Advisory Commission, without the consent or participation of the public or even the majority of the members of the Commission, in sending the letters seeking voter

registration and personal information about every registered voter in the country, in violation of the FACA.

- 85. In fact, the Vice Chair's June 28, 2017 letter to each of the 50 States and the District of Columbia, which is printed on Presidential Advisory Commission letterhead and which bears the Seal of the President of the United States, requests that each jurisdiction receiving the letter respond by July 14, 2017, which is prior even to the first meeting of the Commission for which notice was published in the Federal Register, which is scheduled for July 19, 2017.
- 86. Second, the Presidential Advisory Commission and the other federal Defendants have failed to name all of its members before it began conducting business, in violation of the FACA.
- 87. Pursuant to 5 U.S.C. App. 2 § 2(b)(5), "the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees."
- 88. Yet, as of July 9, 2017, various news reports have indicated that 11 members of the Commission have been appointed, including the Vice President as Chair, and including the Vice Chair. News reports also indicate that one of the members has since resigned from the

Commission, leaving the Commission with 10 members as of this date. Pursuant to the Executive Order, the Commission will have "no more than 15 additional members" besides the Vice President, for a maximum possible total of 16 members. To date, it is unclear whether additional members have been or will be appointed to the Commission, bringing the total above 10. To date, the Commission's members' swearing-in ceremony has not yet taken place because it is noticed for July 19, 2017, even though the Commission has already begun conducting business in violation of the FACA.

- 89. *Third*, the Presidential Advisory Commission and the other federal Defendants have failed to comply with the FACA's requirements regarding advance notice of meetings.
- 90. Pursuant to 41 C.F.R. § 101-6.1015(b), a regulation implementing the FACA:
  - (b) Committee meetings. (1) The agency or an independent Presidential advisory committee shall publish at least 15 calendar days prior to an advisory committee meeting a notice in the FEDERAL REGISTER, which includes:
    - (i) The exact name of the advisory committee as chartered;
    - (ii) The time, date, place, and purpose of the meeting;
    - (iii) A summary of the agenda; and
  - (iv) A statement whether all or part of the meeting is open to the public or closed, and if closed, the reasons why, citing

- the specific exemptions of the Government in the Sunshine Act (5 U.S.C. 552(b)) as the basis for closure.
- (2) In exceptional circumstances, the agency or an independent Presidential advisory committee may give less than 15 days notice, provided that the reasons for doing so are included in the committee meeting notice published in the FEDERAL REGISTER.
- 91. The Presidential Advisory Commission and its affiliated federal Defendants have violated 41 C.F.R. § 101-6.1015(b) in multiple regards, by holding meetings that were not noticed in the Federal Register whatsoever and taking action based upon those un-noticed meetings, including:
  - a. Holding one or more meetings consisting solely of the Vice Chair and/or the Vice President (and possibly other members of the Trump administration, but not including the majority of the members of the Presidential Advisory Commission) that were not noticed in the Federal Register, which led to the Vice Chair sending out letters seeking voter information from all 50 States and the District of Columbia on June 28, 2017, all without the participation or input of the public or even the majority of the Commission's members; and

- b. Holding one or more telephonic meetings that were not noticed in the Federal Register and that did not allow for public participation or input.
- 92. The meetings of the Commission referenced in the preceding paragraph violate 41 C.F.R. § 101-6.1015(b) for failing to provide any notice in the Federal Register whatsoever.
- 93. The Presidential Advisory Commission and its affiliated federal Defendants have also violated 41 C.F.R. § 101-6.1015(b) with regard to the first meeting for which a notice was published in the Federal Register, because the notice is legally deficient.
- 94. The first notice of any meeting of any kind of the Presidential Advisory Commission was published in the Federal Register on July 5, 2017, giving notice of an open meeting to take place on July 19, 2017. 82 Fed. Reg. 31,063 (Exhibit J) (the "First Meeting Notice"). Accordingly, even this First Meeting Notice violates 41 C.F.R. § 101-6.1015(b) in that it provides less than 15 days notice of the meeting and provides no reasons or exceptional circumstances for doing so, in violation of the FACA.

- 95. Fourth, the Presidential Advisory Commission and the other federal Defendants have failed to comply with the FACA's requirement that members of the public be permitted to attend the Commission's open meetings in person.
- 96. Pursuant to 41 C.F.R. § 101-6.1021(b), a regulation implementing the FACA:

The agency head, or the chairperson of an independent Presidential advisory committee, shall ensure that—...(b) The meeting room size is sufficient to accommodate advisory committee members, committee or agency staff, and interested members of the public[.]

- 97. The Presidential Advisory Commission and its affiliated federal Defendants have violated 41 C.F.R. § 101-6.1021(b) with regard to its earlier un-noticed meetings in multiple regards, including by:
  - a. Holding one or more meetings of the Commission that were not noticed in the Federal Register, in which the meeting room was not sufficient to accommodate interested members of the public (and in which the majority of the Commission's members were not even in attendance); and
  - b. Holding one or more telephonic meetings of the Commission that were not noticed in the Federal Register, in

which the meeting room was necessarily not sufficient to accommodate interested members of the public because the meetings took place by telephone, and thus there was no meeting room.

- 98. The Presidential Advisory Commission and its affiliated federal Defendants have also violated 41 C.F.R. § 101-6.1021(b) with regard to the first meeting for which a notice was published in the Federal Register, because the notice is legally deficient.
- The First Meeting Notice states that the meeting "will be 99. the public through livestreaming open to on https://www.whitehouse.gov/live." This indicates that interested members of the public will not be permitted to attend and observe the meeting in person, in violation of 41. C.F.R. § 101-6.1021(b).
- 100. *Fifth*, the Presidential Advisory Commission and the other federal Defendants, including the Vice President, have failed to comply with the FACA's requirements to provide reasonable public participation in the Commission's activities.
- 101. Pursuant to 41 C.F.R § 101-6.1011(b), a regulation implementing the FACA, "[t]he chairperson of an independent

Presidential advisory committee shall comply with the Act and this subpart and shall: . . . (b) [f]ulfill the responsibilities of an agency head as specified in paragraphs (d), (h) and (j) of §101–6.1009 . . . . ." 41 C.F.R. § 101-6.1009(h), referenced therein, provides that:

The head of each agency that uses one or more advisory committees shall ensure: . . . (h) The opportunity for reasonable public participation in advisory committee activities[.]

102. Thus, the Presidential Advisory Commission's refusal to allow in-person attendance at its meetings, along with the Commission having taken action by, at a minimum, sending letters to all 50 States and the District of Columbia seeking voter data to amass and centralize a federal voter database, without any public participation or input, violates the Vice President's obligations as the Chair of the Commission under the FACA to provide for reasonable public participation in the Commission's activities.

103. The Vice President's and Vice Chair's unilateral actions on behalf of the Presidential Advisory Commission, without even the input of the majority of the Commission's members, in seeking to collect voter data from all 50 States and the District of Columbia to amass and centralize a federal voter database without first (a) making known the

final makeup of the Commission's members, (b) holding any meetings for which notice(s) were published in the Federal Register, (c) swearing in the Commission's members, or (d) providing any opportunity for public comment, participation, or input, necessarily violates the FACA because "[p]ublic observation and comment must be contemporaneous to the advisory committee process itself." See Alabama-Tombigbee Rivers Coal., 26 F.3d at 1106.

104. *Sixth*, the Presidential Advisory Commission and the other federal Defendants have failed to make available for public inspection a privacy impact assessment for the collection of voter data.

105. Seventh, the Defendants have failed to comply with 5 U.S.C. app. 2 § 10(b), which provides that "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist."

106. As just one example, the Vice Chair's June 28, 2017 letter to each of the 50 States and the District of Columbia, which is printed on Presidential Advisory Commission letterhead and which bears the Seal of the President of the United States, does not contain any physical address for the Commission. As a result, certain documents are being sent to the Vice Chair at his state government address in Topeka, Kansas, rather than at "a single location in the offices of the advisory committee" in Washington, D.C., as in the case of Florida Secretary of State Ken Detzner's July 6, 2016 response to the Vice Chair attached hereto as Exhibit H. It is unclear whether the Vice Chair and the other Commission members have transmitted, and whether they will transmit, all records received by them individually or on behalf of the Commission to the Commission's office for public record keeping purposes. Unless the Defendants are enjoined to comply with all laws, including those of the FACA pertaining to access to documents, Plaintiffs and the public at large will necessarily lack confidence that the Commission is operating with the requisite transparency and in the sunshine.

- 107. Defendants may have committed additional violations of the FACA not presently known to the Plaintiffs, especially in light of the Defendants' various violations of the FACA that have kept the public in the dark about the Presidential Advisory Commission's conduct.
- 108. Plaintiffs are, individually and in their representative capacities, adversely affected and aggrieved by the Defendants' actions and inaction.
- Advisory Commission, the Vice President, the Vice Chair, and the other federal Defendants to be illegal and enters an order or orders granting injunctive relief to require the Defendants to follow all legal requirements, Plaintiffs, individually and in their representative capacities, will be entered, without their prior knowledge or consent, into an unauthorized national database—the use of which has not been explained—controlled by the whims of the Commission's directors, that is not authorized by any statute or even the Executive Order, and that is the product of numerous violations of the FACA.

### **COUNT II**

**Exceeding the Authority of the Executive Order** 

Against Presidential Advisory Commission, Pence, Kobach, Executive Office of the President, Executive Office of the Vice President, Horne, and Mulvaney

- 110. Plaintiffs restate and incorporate paragraphs 1-73.
- 111. By Executive Order, the purported mission of the Presidential Advisory Commission is to "study the registration and voting processes used in Federal Elections." The Presidential Advisory Commission is then to submit a report identifying laws and actions that "enhance" or "undermine" the American people's confidence in voting systems used for federal elections. It is also supposed to identity and report vulnerabilities in voting systems and practices used for federal elections.
- 112. The Executive Order does not empower the Presidential Advisory Commission to amass and centralize a federal database of voters and then publicize it.
- 113. Through its letters to the 50 States and the District of Columbia, the Presidential Advisory Commission has breached and exceeded its authority under the Executive Order by, *inter alia*,

- (a) Seeking to amass and centralize a federal database of voters with personal and of voters that includes party affiliation, voting history, social security number, military history, criminal history, and address.
- (b) Seeking to place this voter data on an unsecure or otherwise suspect server.
  - (c) Seeking to make the data that it obtains public.
- (d) Violating Section 5 of the Executive Order. That is, by creating a federal database, the Commission is duplicating the work of existing government entities, namely the States and the District of Columbia, as well as the *independent commissions* such as the Federal Election Commission and the U.S. Elections Assistance Commission.
- 114. Plaintiffs are, individually and in their representative capacities, adversely affected and aggrieved by Defendants' actions and inaction.

### **COUNT III**

## Breaches and Violations of Constitutional Separation of Powers and Article II

Against Presidential Advisory Commission, Pence, Kobach, Executive Office of the President, Executive Office of the Vice President, Horne, and Mulvaney

- 115. Plaintiffs restate and incorporate paragraphs 1-73.
- 116. Pursuant to the U.S. Constitution, the powers of the three branches are separated.
- 117. The Framers of the Constitution placed Congress's power in Article I. Executive power follows in Article II.
- 118. Under the U.S. Constitution, Congress is given the power to enforce and protect, through legislation, the right to vote and the election system. The U.S. Constitution gives no power to the Executive Branch concerning the election system or its integrity. Any power the Executive does have to enforce the right to vote or to protect the electoral process is its general enforcement power and its obligation to execute and enforce Congressional acts and laws *faithfully*.
- 119. Under Article I, Congress is given the exclusive federal power to make laws and regulate elections: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be

prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." Art. I, § 4, U.S. Const.

120. Under the 14th, 15th, 19th, 24th, and 26th Amendments to the U.S. Constitution, the right to vote was secured for African-Americans, women, 18-year olds, and poll taxes were eliminated. In each Amendment, Congress was given the power to enforce these rights with legislation. Each of these Amendments conclude with nearly identical language: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Executive is not mentioned.

121. Using its Article I Powers, Congress has created the exclusive legal regime over the enforcement of elections and the right to vote, to safeguard the integrity of the voting systems, and to otherwise regulate the integrity of elections. Such legislation includes, *inter alia*: The Voting Rights Act of 1965; The National Voter Registration Act of 1993 (Motor Voter Law); and the Help America Vote Act of 2002. These laws are aimed at protecting election integrity and the right to vote. The U.S. Court of Appeals for the Eleventh Circuit explained that the

Help America Vote Act "represents Congress's attempt to strike a balance between promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008).

- 122. The Executive Branch has limited, enumerated powers under Article II of the U.S. Constitution.
- 123. Nowhere in the Constitution or through Acts of Congress is the Executive granted or delegated any power to amass and centralize a national database of voters that includes party affiliation, voting history, social security numbers, military history, criminal history, address, or any other of the personal data the Presidential Advisory Commission requested.
- 124. To the extent the Executive has implied or express powers through the enforcement and execution of Congressional Acts including its limited and delegated authority to establish *sunshine*, transparent, out-in-the-open commissions under FACA nowhere does Congress or the Constitution contemplate that the Executive can amass and centralize a national voter database.

- 125. The Commission's acts here are unprecedented.
- 126. One of the Executive's duties is that "he shall take care that the laws be faithfully executed." The Executive through the Presidential Advisory Commission is not faithful to the execution of any law. Rather, the Executive is pursuing a widely disputed complaint that millions voted illegally in the 2016 election.
- 127. The creation and the activities of the Executive's Presidential Advisory Commission unconstitutionally intrude into the Article I powers of Congress over the electoral system, its authority over the protection of the vote, and its authority over the integrity of the election system. The presidential creation of the Presidential Advisory Commission and its ongoing activities violate the separation of powers of the U.S. Constitution.
- 128. These actions have exceeded the scope of the Executive's Article II powers and have otherwise breached Article II.
- 129. These transgressions of Separation of Powers principles as well as Article II limitations and duties include, *inter alia*, the following acts and omissions:

- a. Using the Presidential Advisory Commission to amass and centralize a federal database with personal and private information of voters.
- b. Creating a commission that is not tied to any of the Executive's enumerated Article II powers or to any congressional enactment or authorization.
- c. Creating the Presidential Advisory Commission based on a myth of voter fraud and without any legitimate factual finding to support its purported mission.
- d. Creating the Presidential Advisory Commission as a ruse to do what the Executive cannot otherwise do amass and centralize a federal database with personal and private voter information.
- e. Failing to faithfully execute any law through the creation of and workings of the Presidential Advisory Commission.
- f. Failing to prevent the commission from exceeding its purported authority and purpose as set forth in Section 5 of the Executive Order. That is, by creating a federal

Presidential Advisory Commission database, the duplicating the work of existing government entities, namely and other the states existing, independent election the U.S. Election commissions such Assistance asCommission and Federal Election Commission.

- g. Failing to prevent the Presidential Advisory Commission from exceeding its purported authority and purpose as set forth in the Executive Order. The Order does not direct the Presidential Advisory Commission to amass and centralize a federal database of voters' personal and private information.
- h. Failing to prevent the Presidential Advisory
  Commission from not disclosing its work materials and full
  membership as required under the Federal Advisory
  Committee Act, and to otherwise adhere to the FACA
  disclosure and sunshine requirements as more fully set forth
  in Count I.
- i. Failing to prevent the commission from exceeding its purported authority and purpose as set forth in Section 5

of the Executive Order. That is, by creating a commission whose goal, in the written word, is to protect voting integrity through study of the registration process and voting processes in Federal Elections, the Presidential Advisory Commission is duplicating the work of existing government entities, namely the states and other existing, independent election commissions such as the U.S. Election Assistance Commission and Federal Election Commission.

- j. The creation and the activities of the Presidential Advisory Commission unconstitutionally intrude into the Article I powers of Congress over the electoral system, its authority over the protection of the vote, and its authority over the integrity of the election system. The Presidential Advisory Commission's actions violate the separation of powers delineated in the U.S. Constitution.
  - k. Failing to faithfully execute FACA.

### **COUNT IV**

Violation of The Paperwork Reduction Act, 44 U.S.C. § 3501, et seq.

Against Presidential Advisory Commission, Pence, Kobach, Executive Office of the President, Executive Office of the Vice President, Horne, and Mulvaney

- 130. Plaintiffs restate and incorporate paragraphs 1-73.
- 131. The Paperwork Reduction Act of 1995 ("PRA") was designed for multiple purposes, but most notably was intended to minimize the burden on the public and on state governments, to ensure the "greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government." 44 U.S.C. § 3501 (2017).
- 132. For purposes of the PRA, "the term 'agency' means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . . ." 44 U.S.C. § 3502 (2017). The Presidential Advisory Commission is not otherwise specifically excluded. More particularly, the Executive Office of the

President is specifically included as an agency bound by the requirements of the PRA.

- 133. Agencies, such as the Presidential Advisory Commission, when seeking information from more than 10 respondents, must receive approval from the Office of Management and Budget ("OMB") prior to the collection of information.
- 134. The OMB is tasked with promulgating the Federal Regulations to effectuate the mandates of the PRA.
- 135. Prior to its collection of information directed at more than ten respondents, namely each of the 50 States and the District of Columbia, the Presidential Advisory Commission must strictly comply with statutory prerequisites. See 44 U.S.C. § 3506 (2017).
- 136. This includes, in part, preparing for the Director of the OMB a review that identifies the plan for collection of information, inventory, and control numbers for each item, and that:
  - (iii) informs the person receiving the collection of information of
    - (I) the reasons the information is being collected;
    - (II) the way such information is to be used;
  - (III) an estimate, to the extent practicable, of the burden of the collection;
  - (IV) whether responses to the collection of information are voluntary, required to obtain benefit, or mandatory; and

(V) the fact that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

## 44 U.S.C. § 3506(c)(1)(B)(iii).

- 137. The PRA also requires that the agency must "provide 60-day notice in the Federal Register, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information," 44 U.S.C. § 3506(c)(2)(A), and to solicit comments from the public in order to, in pertinent part:
  - (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;
  - (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
  - (iii) enhance the quality, utility, and clarity of the information to be collected; and
  - (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology[.]

Id.

- 138. Defendants' have not complied with, nor have they attempted to comply with, any of the required actions of the PRA.
- 139. Defendants' collection of the information sought prior to complying with the requirements of the PRA is arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(a) and short of statutory right under 5 U.S.C. § 706(2)(c).

- 140. The Commission is prohibited from collecting information unless in advance of the collection of information the agency has completed all prerequisites pursuant to the prior sections and other items set forth in 44 U.S.C. § 3507.
- 141. Plaintiffs are, individually and in their representative capacities, adversely affected and aggrieved by Defendants' actions and inaction.
- 142. The only remedy that will grant full relief to Plaintiffs for these violations of the Paperwork Reduction Act is an order enjoining the Defendants to comply with the PRA prior to the collection of any information by the Presidential Advisory Commission.

### **COUNT V**

Violation of Florida Statute § 97.0585: Information Regarding Voters and Voter Registration Confidentiality

# Against Presidential Advisory Commission and Detzner

- 143. Plaintiffs restate and incorporate paragraphs 1-73.
- 144. The Florida Constitution guarantees the right of privacy to all persons, Art. I, § 23, Florida Constitution:

Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

145. Florida law provides for the confidentiality of certain voter information and voting registration data in § 97.0585, Florida Statutes:

Public records exemption; information regarding voters and voter registration; confidentiality.—

- (1) The following information held by an agency as defined in s. 119.011 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution and may be used only for purposes of voter registration:
  - (a) All declinations to register to vote made pursuant to ss. 97.057 and 97.058.
  - (b) Information relating to the place where a person registered to vote or where a person updated a voter registration.

- (c) The social security number, driver license number, and Florida identification number of a voter registration applicant or voter.
- (2) The signature of a voter registration applicant or a voter is exempt from the copying requirements of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.
- (3) This section applies to information held by an agency before, on, or after the effective date of this exemption.
- 146. The Presidential Advisory Commission's request for voter identifying information includes information deemed confidential under Florida law.
- 147. The Florida Secretary of State is obligated by the Florida Constitution and laws to preserve and maintain the confidentiality of exempt voter registration information. The Florida Secretary of State must be prohibited from disclosing the private, protected confidential information to the Presidential Advisory Commission. Minimally, the Florida Secretary of State must be enjoined to comply with the requirements in Fla. Stat. § 119.07(1)(d) by redacting any private, protected confidential information to the Presidential Advisory Commission.
- 148. On July 6, 2017, Defendant Detzner issued a press statement indicating he would comply with the Commission's request

for personal voter registration information from Florida's voter database. Defendant Detzner also stated that in doing so, he will comply with the restrictions set forth in § 97.0585 which prohibit the sharing of a voter's social security number and Driver's License number. To ensure Defendant Detzner complies with § 97.0585, and to prohibit the Commission from attempting to obtain that protected information from any other source, Plaintiffs seek an injunction pursuant to § 97.0585 to preclude disclosure of the social security numbers and Driver's License numbers of Florida voters.

149. At the time of this filing, it is not known whether the Florida Secretary of State has already transmitted the voter data to the Commission, and if so whether he has transmitted only that information permitted to be disclosed under Florida constitutional and statutory provisions cited above, nor whether the transmission of data has been made using a secure method of transmission.

150. To the extent the Presidential Advisory Commission seeks disclosure of private voter information, the request for information is contrary to Florida law.

151. Plaintiffs are, individually and in their representative capacities, adversely affected and aggrieved by Defendants' actions and inaction.

## REQUESTED RELIEF

Plaintiffs request that this Court:

- A. Order expedited consideration;
- B. Declare that the Presidential Advisory Commission and its members have violated the FACA and enjoin the Presidential Advisory Commission and its members from conducting any business unless and until the FACA is fully complied with, and further enjoin all of the federal Defendants from utilizing the products of any materials or information obtained or produced in violation of the FACA;
- C. Declare and hold unlawful and set aside Defendants' authority to collect personal voter data from the states;
  - D. Order Defendants to halt collection of personal voter data;
- E. Order Defendants to securely delete and properly disgorge any personal voter data collected or subsequently received;
- F. Order Defendants to promptly conduct a privacy impact assessment prior to the collection of personal voter data;

- G. Declare that the Presidential Advisory Commission and its members have violated the PRA and enjoin the Presidential Advisory Commission and its members from conducting any business unless and until the PRA is fully complied with, and further enjoin all of the federal Defendants from utilizing the products of any materials or information obtained or produced in violation of the PRA;
- H. Order Defendant Florida Secretary of State to withhold voter-identifying information from the Presidential Advisory Commission;
- I. Award costs and reasonable attorney's fees incurred in this action; and
- J. Grant such other relief as the Court may deem just and proper.

Dated: July 10, 2017

Respectfully submitted,

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# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., 1600 20th Street NW Washington, DC 20009,	) ) )
Plaintiff,	) Civil Action No.
v.	)
UNITED STATES DEPARTMENT OF THE ARMY, 104 Army Pentagon, Room 2E724 Washington, DC 20310,	) ) ) ) )
Defendant.	) )

#### COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought to enjoin ongoing and imminent violations of the Privacy Act by the United States Department of the Army (Army). The Privacy Act prohibits any agency from collecting, using, maintaining, or disseminating records describing how any individual exercises rights guaranteed by the First Amendment. At the request of the Vice Chair of the Presidential Advisory Commission on Election Integrity (Commission), many states will soon submit, and at least one already has submitted, such information to the Army. By accepting this data, the Army will violate the Privacy Act's prohibition on collecting such information; if the Army allows the Commission to download this data, it will violate the Privacy Act's prohibition on disseminating this information. Furthermore, once the Commission downloads this information from the Army, there will be no remedy at law for the Army's violation of the Privacy Act. Therefore, Public Citizen, on behalf of its members, sues to enjoin the Army from collecting, using, maintaining, or disseminating this data, in violation of the Privacy Act.

#### JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331, 5 U.S.C. § 552a(g)(1)(D), and 5 U.S.C. § 702. Venue is proper under 5 U.S.C. § 552a(g)(5) and 28 U.S.C. § 1391.

#### **PARTIES**

- 3. Plaintiff Public Citizen, Inc., is a non-profit consumer advocacy organization with members and supporters nationwide. Public Citizen engages in research, advocacy, media activity, and litigation related to, among other things, government accountability and protection of consumer rights. Public Citizen brings this suit on behalf of its members who are upset by the collection of data describing how they exercise rights guaranteed by the First Amendment, and who have fear and anxiety related to how the Commission intends to use the information, including their voting histories and political affiliations.
- 4. Defendant Army is an agency of the federal government of the United States. The Army maintains systems of records subject to the Privacy Act.

#### STATUTORY FRAMEWORK

- 5. Section (e)(7) of the Privacy Act mandates that an agency "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7). This prohibition applies to any agency that maintains any system of records, even if the specific record is not incorporated into a system of records. *See Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 169 (D.C. Cir. 2013); *Albright v. United States*, 631 F.2d 915, 919 (D.C. Cir. 1980).
- 6. The Privacy Act defines a "record" as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his

education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. § 552a(a)(4).

- 7. The Privacy Act defines "maintain" as "maintain, collect, use, or disseminate." *Id.* § 552a(a)(3).
- 8. The Privacy Act incorporates the definition of "agency" found in the Freedom of Information Act, *id.* § 552a(a)(1), which in turn defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." *Id.* § 552(f).

#### FACTUAL BACKGROUND

- 9. The Commission was established by executive order on May 11, 2017. Exec. Order No. 13799, 82 Fed. Reg. 22,389 (May 11, 2017).
- 10. Under Executive Order 13799, the Commission is directed to "study the registration and voting processes used in Federal elections" and "submit a report to the President that identifies ... (a) those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections; (b) those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections; and (c) those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting."
  - 11. The Commission charter mirrors the substantive terms of Executive Order 13799.

- 12. Executive Order 13799 names the Vice President as the Chair of the Commission, "which shall be composed of not more than 15 additional members." *Id.* Additional members are appointed by the President, and the Vice President may select a Vice Chair of the Commission from among the members. *Id.* Vice President Pence has named Kansas Secretary of State Kris Kobach to serve as Vice Chair of the Commission.
- 13. On June 28, 2017, Vice Chair Kobach sent a letter to the Secretaries of State for all 50 states and the District of Columbia requesting data from state voter rolls. The data requested includes political party and voter history from 2006 onwards (collectively, the Protected Records), as well as full name, address, date of birth, last 4 digits of social security number, active/inactive voter status, cancelled voter status, information regarding any felony conviction, information regarding voter registration in another state, information regarding military status, and information regarding overseas citizenship. The Vice Chair noted that "any documents that are submitted to the full Commission will also be made available to the public." The letter provided that responses should be submitted by July 14, 2017, "electronically to ElectionIntegrityStaff@ovp.eop.gov or by utilizing the Safe Access File Exchange ('SAFE'), ... a secure FTP site the federal government uses for transferring large data files."
- 14. On July 5, 2017, in response to litigation initiated by the Electronic Privacy Information Center (EPIC) in the United States District Court for the District of Columbia challenging the Commission's requests for the records (*EPIC v. Presidential Advisory Commission on Election Integrity*, No. 17-1320), Vice Chair Kobach submitted a declaration stating that the records would be submitted through SAFE, and that only narrative responses would be submitted by email. The declaration clarified that the only "documents" that would be made publicly available would be the narrative responses. It also stated that "[w]ith respect to voter roll data, the

Commission intends to de-identify any such data prior to any public release of documents." Vice Chair Kobach also stated that no state had yet provided information through SAFE.

- 15. On July 6, 2017, Vice Chair Kobach submitted a second declaration answering questions posed by the judge in *EPIC*. In his declaration, Vice Chair Kobach explained that the SAFE website is operated by the United States Army Aviation and Missile Research Development and Engineering Center (AMRDEC), a component of the Army. Vice Chair Kobach further explained that states will upload the records to SAFE, and the Commission staff will download the records from the website onto White House computers.
- 16. Some Secretaries of States and other state officials have stated that they will not comply with the request; others have stated that they will provide the information requested by the Commission if not prohibited by their states' laws. Others have not publicly responded.
- 17. On, July 7, 2017, attorneys for the government stated in a hearing in the *EPIC* case that on July 6, 2017, Arkansas had uploaded voter data to SAFE, where it is being stored.
- 18. Once the Protected Records are downloaded into the White House computers by the Commission, there will be no adequate remedy available for the violations of the Privacy Act.

# FIRST CLAIM FOR RELIEF (Privacy Act)

- 19. The Privacy Act permits suit when an agency "fails to comply with any ... provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D).
- 20. The Protected Records constitute records describing how individuals exercise their rights guaranteed by the First Amendment.
- 21. The Protected Records are not within the scope of any authorized law enforcement activity.

- 22. Under the Privacy Act, the Army cannot collect, use, maintain, or disseminate the Protected Records.
- 23. Plaintiff's members are adversely affected by the Army's violation of the Privacy Act.
- 24. Once the Protected Records have been provided to the Commission, plaintiff will be unable to remedy its continuing harm and thus will suffer irreparable harm absent an injunction.
- 25. Plaintiff is entitled to relief enjoining the Army from collecting, maintaining, and disseminating the Protected Records and directing the Army to expunge any Protected Records that are in its possession or come into its possession.

# SECOND CLAIM FOR RELIEF (Administrative Procedure Act)

- 26. The Administrative Procedure Act (APA) provides that a reviewing court may set aside final agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).
- 27. The Army's decision to collect, maintain, and disseminate the Protected Records in violation of the Privacy Act is a final agency action that is not in accordance with law.
- 28. Once the Protected Records have been provided to the Commission, plaintiff will be unable to remedy its continuing harm and thus will suffer irreparable harm absent an injunction.
- 29. If relief is unavailable under the Privacy Act, plaintiff is entitled to declaratory and injunctive relief under 5 U.S.C. § 706 enjoining the Army from collecting, maintaining, and disseminating the Protected Records and directing the Army to expunge any Protected Records that are in its possession or come into its possession.

#### PRAYER FOR RELIEF

Wherefore, plaintiff requests that this Court:

- A. Declare that the defendant's maintenance of the Protected Records violates the Privacy Act and, in the alternative, the APA;
- B. Enjoin the Army from collecting, maintaining, using, or disseminating the Protected Records;
- C. Order the Army to expunge all Protected Records collected prior to entry of the Court's order;
  - D. Award plaintiff its costs and reasonable attorney fees; and
  - E. Grant all other appropriate relief.

Dated: July 10, 2017 Respectfully submitted,

/s/ Sean M. Sherman

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#### TIME LINE FOR ACTIONS TO BE TAKEN TO STAND UP THIS COMMISSION

- 1. Executive Order is filed
- 2. GSA is notified and Charter is signed by the Administrator
- 3. Charter is filed at the Committee Management Secretariat
- 4. Letters sent to the appropriate committee on Hill notifying them of the creation of the Committee
- 5. Members are appointed
- 6. Press is notified of members



Federal Register

Vol. 78, No. 64

Wednesday, April 3, 2013

## **Presidential Documents**

Title 3—

The President

Executive Order 13639 of March 28, 2013

## **Establishment of the Presidential Commission on Election Administration**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the efficient administration of Federal elections and to improve the experience of all voters, it is hereby ordered as follows:

**Section 1.** Establishment. There is established the Presidential Commission on Election Administration (Commission).

- **Sec. 2.** *Membership.* (a) The Commission shall be composed of not more than nine members appointed by the President. The members shall be drawn from among distinguished individuals with knowledge about or experience in the administration of State or local elections, as well as representatives of successful customer service-oriented businesses, and any other individuals with knowledge or experience determined by the President to be of value to the Commission.
- (b) The President shall designate two members of the Commission to serve as Co-Chairs.
- **Sec. 3**. *Mission*. (a) The Commission shall identify best practices and otherwise make recommendations to promote the efficient administration of elections in order to ensure that all eligible voters have the opportunity to cast their ballots without undue delay, and to improve the experience of voters facing other obstacles in casting their ballots, such as members of the military, overseas voters, voters with disabilities, and voters with limited English proficiency.

In doing so, the Commission shall consider as appropriate:

- (i) the number, location, management, operation, and design of polling places;
- (ii) the training, recruitment, and number of poll workers;
- (iii) voting accessibility for uniformed and overseas voters;
- (iv) the efficient management of voter rolls and poll books;
- (v) voting machine capacity and technology;
- (vi) ballot simplicity and voter education;
- (vii) voting accessibility for individuals with disabilities, limited English proficiency, and other special needs;
- (viii) management of issuing and processing provisional ballots in the polling place on Election Day;
- (ix) the issues presented by the administration of absentee ballot programs;
- (x) the adequacy of contingency plans for natural disasters and other emergencies that may disrupt elections; and
- (xi) other issues related to the efficient administration of elections that the Co-Chairs agree are necessary and appropriate to the Commission's work.
- (b) The Commission shall be advisory in nature and shall submit a final report to the President within 6 months of the date of the Commission's first public meeting.

- **Sec. 4**. Administration. (a) The Commission shall hold public meetings and engage with Federal, State, and local officials, technical advisors, and nongovernmental organizations, as necessary to carry out its mission.
- (b) In carrying out its mission, the Commission shall be informed by, and shall strive to avoid duplicating, the efforts of other governmental entities.
- (c) The Commission shall have a staff which shall provide support for the functions of the Commission.
- **Sec. 5**. *Termination*. The Commission shall terminate 30 days after it presents its final report to the President.
- **Sec. 6.** *General Provisions.* (a) To the extent permitted by law, and subject to the availability of appropriations, the General Services Administration shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission on a reimbursable basis.
- (b) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (the "Act"), may apply to the Commission, any functions of the President under that Act, except for those in section 6 of the Act, shall be performed by the Administrator of General Services.
- (c) Members of the Commission shall serve without any additional compensation for their work on the Commission, but shall be allowed travel expenses, including per diem in lieu of subsistence, to the extent permitted by law for persons serving intermittently in the Government service (5 U.S.C. 5701–5707).
  - (d) Nothing in this order shall be construed to impair or otherwise affect:
  - (i) the authority granted by law to a department, agency, or the head thereof; or
  - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(Sur Du

THE WHITE HOUSE, March 28, 2013.

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Civil Action No. 1:17-cv-1320 (CKK)

Plaintiff,

v.

PRESIDENTIAL ADVISORY **COMMISSION ON ELECTION** INTEGRITY, et al.,

Defendants.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR **A TEMPORARY RESTRAINING ORDER** 

#### **INTRODUCTION**

The Court should deny plaintiff Electronic Privacy Information Center's ("EPIC") extraordinary request for an emergency injunction prohibiting the Presidential Advisory Commission on Election Integrity ("the Commission") from collecting, on a voluntary basis, publicly available voter data from state election officials.

As a threshold matter, the Court lacks jurisdiction to issue a temporary restraining order because EPIC failed to establish its standing. EPIC alleged no facts that the organization itself has suffered any injury, nor did it identify a single member who is suffering injury. In any event, EPIC's members could not possibly be injured by the transfer of *public* information from one sovereign to another. Its concerns about a possible data breach at some point in the future by unknown third parties fall well short of an imminent and concrete injury that is traceable to the Commission and redressable by this Court.

Even assuming the Court has jurisdiction, EPIC has not established its entitlement to emergency injunctive relief. EPIC has not shown that it will suffer any harm – much less *irreparable* harm – in the absence of a temporary restraining order. The voter data that EPIC seeks to enjoin the Commission from collecting is already made publicly available by the states. The Commission has established reasonable measures to protect the security of the voter data by using a secure method to transfer the data and storing any data in the White House's information systems.

Nor has EPIC established a substantial likelihood of success on the merits because it has no viable claims. Both the Administrative Procedure Act ("APA") and the E-Government Act of 2002 apply only to "agencies," but the Commission is not an "agency" within the meaning of

these statutes because its sole purpose is to provide advice to the President. EPIC's claim that the voluntary collection of publicly available voter information violates a constitutional right to informational privacy is meritless. Neither the Supreme Court nor the D.C. Circuit has held that such a right even exists. Even if such a right did exist, it would not apply to information that is already publicly available.

Finally, the public interest weighs against emergency injunctive relief. The President established the Commission "in order to promote fair and honest Federal elections." Executive Order No. 13,799, 82 Fed. Reg. 22,389, 22,389 (May 11, 2017). By collecting voter data from the states, the Commission seeks to "enhance the American people's confidence in the integrity of the voting processes used in Federal elections." *Id.* EPIC seeks to halt this important work with meritless claims and a baseless fear about the states voluntarily submitting publicly available voter data to the federal government. Accordingly, EPIC's motion for a temporary restraining order should be denied.

## **BACKGROUND**

The President established the Presidential Advisory Commission on Election Integrity in Executive Order No. 13,799. 82 Fed. Reg. 22,389 (May 11, 2017) [hereinafter Exec. Order No. 13,799]; see also Declaration of Kris W. Kobach ("Kobach Decl.") ¶ 3 & Exh. 1. The Commission is charged with "study[ing] the registration and voting processes used in Federal elections," "consistent with applicable law." Exec. Order No. 13,799, § 3. Vice President Pence is the Chairman of the Commission. *Id.* § 2. Kansas Secretary of State Kris Kobach is the Vice Chair of the Commission. Kobach Decl. ¶¶ 2, 3. The members of the Commission come from federal, state, and local jurisdictions across the political spectrum. *Id.* ¶ 3.

In furtherance of the Commission's mandate, the Vice Chair has sent letters to the states and the District of Columbia requesting publicly available data from state voter rolls and feedback on how to improve election integrity. Kobach Decl. ¶ 4. Among other things, the letters sent by the Vice Chair requested:

the *publicly-available* voter roll data for [the State], including, *if publicly available under the laws of your state*, the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.

See, e.g., id., Exh. 3 (letter to Alabama) (emphasis supplied).

The Vice Chair requested responses by July 14, 2017. Kobach Decl. ¶ 5 & Exh. 3. He provided two methods for the states to respond. *Id.* Narrative responses, not containing data, can be sent via email to the address provided in the letter. *Id.* This email is a White House email address (in the Office of the Vice President) subject to the security protecting all White House communications and networks. *Id.* 

For data files, which would be too large to send via electronic mail, states can use the Safe Access File Exchange ("SAFE"), which is a secure method of transferring large files up to two gigabytes in size. Kobach Decl. ¶ 5 & Exh. 3. Once received, the Commission intends to maintain the transferred data on the computer systems of the White House. *Id.* ¶ 5. SAFE is a tested and reliable method of secure file transfer used routinely by the military for large, unclassified data sets. *Id.* It also supports encryption by individual users. *Id.; see generally* Safe Access File Exchange, https://safe.amrdec.army.mil/safe/Welcome.aspx (last visited July 5,

2017). Individuals who access the site receive a security warning that the user is accessing a U.S. government network. *See id.* Undersigned counsel were not able to reproduce any error message indicating that the site was insecure. *See* Pl.'s TRO Mem. (ECF No. 3), at 7.

The Commission has not yet received any substantive responses or data from the states. Kobach Decl.  $\P$  6.

## **ARGUMENT**

#### EPIC IS NOT ENTITLED TO A TEMPORARY RESTRAINING ORDER

"The standard for issuance of the extraordinary and drastic remedy of a temporary restraining order or a preliminary injunction is very high." *Jack's Canoes & Kayaks, LLC v.*Nat'l Park Serv., 933 F. Supp. 2d 58, 76 (D.D.C. 2013) (citation omitted). An interim injunction is "never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion," *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). A party moving for a temporary restraining order or a preliminary injunction "must demonstrate '(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Jack's Canoes*, 933 F. Supp. 2d at 75-76 (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)).

### I. EPIC HAS NOT ESTABLISHED THAT IT HAS STANDING

EPIC's request for a temporary restraining order must be denied because it has failed to establish standing to seek such relief. *See Aamer v. Obama*, 742 F.3d 1023, 1028 (D.C. Cir. 2014) ("We begin, as we must, with the question of subject-matter jurisdiction." (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998))). The doctrine of standing, an essential aspect of the Article III case-or-controversy requirement, demands that a plaintiff have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). At its "irreducible constitutional minimum," the doctrine requires a plaintiff to establish three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendants' challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

To establish injury-in-fact, a plaintiff must show that the defendant's action affects him or her in a "personal and individual way," *see id.* at 560 n.1, rather than in some generalized way common to the general public, *see United States v. Richardson*, 418 U.S. 166, 176 (1974).

Moreover, a plaintiff must show more than a "possible future injury"; he or she must show that harm has actually occurred or is "certainly impending." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citations omitted). The Supreme Court has emphasized that "threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S. Ct. 1138, 1147 (2013) (citations omitted).

EPIC claims standing in its own right and as a representative of its members. Compl. (ECF No. 1) ¶¶ 5, 6; Pl.'s TRO Mem. 2. To bring suit on its own behalf, an organization must itself meet the requirements for standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). To establish representational standing, an organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ass'n of Flight Attendants–CWA v. Dep't of Transp.*, 564 F.3d 462, 464 (D.C. Cir. 2009) (citations omitted).

EPIC cannot demonstrate standing either for itself or as a representative of its members. It has not established that the organization has been or will be injured because none of the voting data at issue pertains to EPIC itself. EPIC has also failed to identify a single member who has suffered or will suffer an injury. *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured." (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009))); *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006) ("[A]n organization bringing a claim based on associational standing must show that at least one specifically-identified member has suffered an injury-in-fact. . . . At the very least, the identity of the party suffering an injury in fact must be firmly established.").

Even if a member were identified, any claim of injury would be entirely speculative. EPIC claims that its members may be harmed in the future if the publicly available data is not securely transferred to the Commission and if that data is then breached by an unknown third party. Pl.'s TRO Mem. 17-18. To guard against such breaches, the data is intended to be

transmitted via a secure method and then maintained on secure White House servers. *See* Kobach Decl. ¶ 5 & Exh. 3. Particularly in view of these safeguards, plaintiff's "highly attenuated chain of possibilities" is insufficient to establish standing. *Clapper*, 133 S. Ct. at 1148.

EPIC further claims that the Commission will publicly disclose its members' voting information and that the unnamed members could be harmed when this data is then used for "deviant purposes." Pl.'s TRO Mem. 17. EPIC overlooks that the Commission only requested information that is already publicly available from the states. The Commission will not publicly disclose the data in personally identifiable form. *See* Kobach Decl. ¶ 5. In any event, EPIC's amorphous fear of a future data breach by unknown bad actors does not establish imminent and concrete injury. *See In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Lit.*, 45 F. Supp. 3d 14, 26 (D.D.C. 2014) (increased risk of identity theft alone does not confer standing in data-breach cases); *see also Welborn v. IRS*, 218 F. Supp. 3d 64, 77 (D.D.C. 2016) (even an "objectively reasonable likelihood" of future breach cannot support standing) (quoting *Clapper*, 133 S. Ct. at 1157-48), *appeal dismissed by* 2017 WL 2373044 (D.C. Cir. Apr. 18, 2017) Nor is any risk of a data-breach injury fairly traceable to the Commission. This data is equally vulnerable (if at all) in the hands of the states. Securely transferring data to a secure White House server does not increase the risk of improper disclosure.

In sum, because EPIC lacks standing, the Court lacks jurisdiction to issue a temporary restraining order.

## II. EPIC HAS FAILED TO ESTABLISH THAT IT OR ITS MEMBERS WILL SUFFER IRREPARABLE HARM

The motion should also be denied because EPIC has not established that it will suffer irreparable injury absent a temporary restraining order. The D.C. Circuit "has set a high standard for irreparable injury." *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (citation omitted). It is a "well known and indisputable principle[]" that a "unsubstantiated and speculative" harm cannot constitute "irreparable harm" sufficient to justify injunctive relief. *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

EPIC cannot demonstrate irreparable injury for the same reason it lacks standing. It cannot establish that the organization or one of its members has suffered or will suffer a concrete or "certainly impending" injury. EPIC is concerned that the Commission will publicly disclose the information it obtains, but the Commission has only requested data that is *already* publicly available, much, if not all, of it pursuant to the National Voter Registration Act, 52 U.S.C. § 20507(i)(1), or through public access laws of individual states. See National Conference of State Legislatures, States and Election Reform (Feb. 2015) (discussing availability of voter information under state laws), http://www.ncsl.org/Documents/Elections/The Canvass February\_2016\_66.pdf; see also Project Vote v. Long, 682 F.3d 331, 336 (4th Cir. 2012) (holding that 52 U.S.C. § 20507(i)(1) "unmistakably encompasses completed voter registration applications"). The Commission has no intention of publicly disclosing data that are personally identifiable. Kobach Decl. ¶ 5. EPIC's speculative fear of a future breach of White House information systems by unknown third parties causing the release of information already available to the public cannot establish irreparable injury. Even without the Commission's collection of the information, the possibility of a breach will always exist (unfortunately) at the

state level; moreover, as the Commission has only requested information that is otherwise publicly available, there is nothing to prevent members of the public from accessing that information through a lawful request. Accordingly, the Commission's request for information has done nothing to increase any risk to EPIC's members and certainly does not create "irreparable injury" caused by the Commission and justifying emergency injunctive relief.

EPIC's claim of irreparable injury based on a violation of a supposed constitutional right to informational privacy also fails. As discussed below, there is no constitutional right to informational privacy for information that is already public. Because EPIC fails to establish irreparable harm, there is no basis for the Court to invoke its emergency powers at this early stage in the litigation.

## III. PLAINTIFF HAS NOT ESTABLISHED SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

EPIC has also failed to demonstrate substantial likelihood of success on the merits because it has no viable claim. First, EPIC has failed to state a claim under the APA or the E-Government Act of 2002 because the Commission is not an "agency" within the meaning of those statutes. Second, neither the Supreme Court nor the D.C. Circuit has recognized a constitutional right to informational privacy, but even if such a right exists, it would not apply to information that is already publicly available.

## A. The Commission Is Not an "Agency" for Purposes of the Administrative Procedure Act or the E-Government Act of 2002

As an initial matter, EPIC does not have a valid claim under the E-Government Act. "[T]he E-Government Act of 2002 does not provide a private right of action." *Greenspan v. Admin. Office of the U.S. Courts*, No. 14-cv-2396, 2014 WL 6847460, at \*8 (N.D. Cal. Dec. 4,

2014). EPIC must therefore use the Administrative Procedure Act's ("APA") cause of action. 5 U.S.C. § 702. The APA, however, only applies to *agency* action, and the Commission is not an agency for the purposes of the APA. Accordingly, EPIC has no valid claim under the APA.

The APA defines an "agency" as "each authority of the Government of the United States," subject to several limitations not applicable here. 5 U.S.C. § 551(1). It is well established that the President and his close advisors do not fall within the APA's ambit. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (holding that "[o]ut of respect for the separation of powers and the unique constitutional position of the President," he is not subject to the APA). In *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), the D.C. Circuit laid out a three-factor test to determine whether a group within the Executive Office of the President constituted an "agency": "(1) how close operationally the group is to the President, (2) whether it has a self-contained structure, and (3) the nature of its delegated authority." *Armstrong v. Exec. Office of the Pres.*, 90 F.3d 553, 558 (D.C. Cir. 1996) (quoting *Meyer*, 981 F.3d at 1293); *see also id.* ("The closer an entity is to the President, the more it is like the White House staff, which solely advises and assists the President, and the less it is like an agency to which substantial independent authority has been delegated.").<sup>2</sup>

 $<sup>^1</sup>$  Although the General Services Administration ("GSA") is named as a defendant to this action, the present motion seeks to enjoin the collection of data, in which only the Commission is involved. See Pl.'s TRO Mot.; Kobach Decl. ¶ 4.

<sup>&</sup>lt;sup>2</sup> This guidance comes mainly in the context of case law interpreting the definition of "agency" for purposes of the Freedom of Information Act ("FOIA"), which is broader than the definition of "agency" for purposes of the APA. The APA defines an "agency" as "each authority of the Government of the United States." 5 U.S.C. § 551(1). The FOIA, in turn, incorporates the definition set out in section 551(1) of the APA, and then expands the definition, stating that it "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory

In applying this test, courts look at whether the entity has "substantial independent authority," including regulatory or funding powers. *Citizens for Resp. & Ethics in Wash*.

("CREW") v. Office of Admin., 566 F.3d 219, 222-23 (D.C. Cir. 2009). For example, this Circuit has held that the Council of Economic Advisors is not an "agency" because it lacks regulatory power or independent authority, id. at 223, the National Security Council is not an "agency" because it plays only a "coordinating role on behalf of the President," id. (quoting Armstrong, 90 F.3d at 565), and the Office of Administration within the Executive Office of the President is not an "agency" because it provides "operational and administrative" tasks in "direct support of the President," id. at 224-25. See also Armstrong, 90 F.3d at 558-59 (collecting cases). Plaintiff does not even acknowledge, let alone attempt to distinguish, this line of cases.

Like these other White House entities, the Commission is an entity that "serve[s] solely to advise and assist the President," *Armstrong*, 90 F.3d at 558, and is not, therefore, an agency subject to the APA. The Commission reports directly to the President and is "solely advisory," Exec. Order No. 13,799; *see also* Charter, Presidential Advisory Commission on Election Integrity ¶ 4 ("The Commission will function solely as an advisory body.") (Kobach Decl., Exh. 2). It is chaired by the Vice President, a constitutional officer (and not, of course, an agency head). Exec. Order No. 13,799, at § 2. Its purpose is to "submit a report to the President" that identifies rules and activities that enhance and undermine the "American people's confidence in the integrity of the voting processes used in Federal elections" and to identify vulnerabilities in voting systems that could lead to improprieties. *Id.* § 3(a)-(c). The Commission has no

agency." 5 U.S.C. § 552(f)(1). See also Aaron J. Saiger, Obama's 'Czars' for Domestic Policy and the Law of the White House Staff, 79 Ford. L. Rev. 2577, 2599 (2011) ("FOIA uses a definition of 'agency' more expansive than used under the rest of the APA . . . .").

regulatory or funding powers, nor does it have any independent administrative responsibilities. Instead, it exists solely to provide research and advice to the President. *CREW*, 566 F.3d at 222-23. It is not, therefore, an "agency" subject to the APA, and the plaintiff's APA claim fails for that threshold reason alone.

Nor has EPIC stated a valid claim that the Commission was required to conduct a Privacy Impact Assessment under Section 208 of the E-Government Act, even if EPIC were able to assert a claim directly under the statute (which it cannot). E-Government Act of 2002, Pub. L. No. 107-347, § 208, 116 Stat. 2899. The E-Government Act applies to "agencies," as defined in 44 U.S.C. § 3502(1), which uses the same definition of "agency" as the FOIA (and is therefore subject to the same limitations as the D.C. Circuit has above defined). *See* E-Government Act § 201, 116 Stat. 2899. Because the Commission, which provides only advice and assistance to the President, is not an agency, it was not required to perform a Privacy Impact Assessment.<sup>3</sup>

Although not a basis for the present motion, EPIC's assertion that the Commission violated section 10(b) of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2 § 10(b), by failing to publish a Privacy Impact Assessment or make one available for public inspection fares no better. *See* Compl. ¶ 41, 45-49. Defendants do not concede that FACA applies to the Commission or that EPIC has a cause of action under FACA here. *See In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (construing FACA statute strictly); *Ass'n of Am*.

<sup>&</sup>lt;sup>3</sup> Even apart from the functional test establishing that the Commission exists to advise and assist the President, and is therefore not an "agency" under the APA, it is clear that an entity cannot be at once both an advisory committee and an agency. *See Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 36 (D.D.C. 2006) (noting that an "advisory committee cannot have a double identity as an agency" (quoting *Wolfe v. Weinberger*, 403 F. Supp. 238, 242 (D.D.C. 1975))).

Physicians & Surgeons, Inc. v. Clinton, 997 F.3d 898, 909-10 (D.C. Cir. 1993) (application of FACA to presidential advisory groups can raise constitutional concerns). Regardless, EPIC's FACA claim is meritless because the Commission – which is not an agency – is not required to conduct a Privacy Impact Assessment, nor has it done so, and therefore there is no report to publish. Accordingly, EPIC has failed to establish any violation of FACA.

B. Neither the Supreme Court Nor the D.C. Circuit Has Recognized a
Constitutional Right to Informational Privacy, But Even If There Were, It
Would Not Prohibit the Federal Government From Requesting Publicly
Available Information From States

EPIC's claim of a constitutional right to informational privacy fails because neither the Supreme Court nor the D.C. Circuit has held that a federal constitutional right to informational privacy exists. Although the Supreme Court has assumed, without deciding, that the Constitution protects the individual "interest in avoiding disclosure of personal matters," *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 138 (2011), the Court has not specifically held that a supposed constitutional right to informational privacy actually exists. For its part, the D.C. Circuit has expressed "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information." *Am. Fed'n of Gov't Emps., AFL-CIO v. Dep't of House. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997).

<sup>&</sup>lt;sup>4</sup> Several justices have criticized that approach and expressly questioned the existence of a constitutional right to informational privacy. *See Nelson*, 562 U.S. at 159-60 (Scalia, J., concurring in the judgment) ("[I]nformational privacy' seems like a good idea . . . [b]ut it is up to the People to enact those laws, to shape them, and, when they think it appropriate, to repeal them. A federal constitutional right to 'informational privacy' does not exist."); *id.* at 169 (Thomas, J., concurring in the judgment) ("I agree with Justice Scalia that the Constitution does not protect a right to informational privacy. No provision in the Constitution mentions such a right." (internal citations omitted))).

Even assuming such a right exists, EPIC's claim would still fail because the Commission has only requested information that is "publicly available." Kobach Decl., Exh. 3, at 1-2. Whatever the bounds of a supposed constitutional right to informational privacy, it does not extend to matters already in the public record. Indeed, courts have repeatedly held that "there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record." Doe v. City of N.Y., 15 F.3d 264, 268 (2d Cir. 1994) (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 493-96 (1975)); see also Doe v. Lockwood, No. 95-3499, 1996 WL 367046, at \*4 (6th Cir. June 27, 1996) (table) ("In order to sustain their claim that John Doe has a federal constitutional right to informational privacy, the Does must allege facts to show that the information regarding John Doe's HIV status was not already in the public realm."); Lewis v. Delarosa, No. C-15-2689, 2015 WL 5935311, at \*3 (N.D. Cal. Oct. 13, 2015) ("Plaintiff's allegations that his right to informational privacy was violated when his non-private identification information was published on the internet is not included in even the outer confines of a federal right to informational privacy."); Jones v. Lacey, 108 F. Supp. 3d 573, 584-85 (E.D. Mich. 2015) (no right to informational privacy with respect to information that had been publicly released); *Pelosi v. Spota*, 607 F. Supp. 2d 366, 373 (E.D.N.Y. 2009) (same).

EPIC has not pled – much less established – that the Commission's explicit request only for "publicly available voter roll data," Kobach Decl. ¶ 4, encompasses *private* sensitive personal information not already available to the general public as a matter of public record.<sup>5</sup> Nor has

<sup>&</sup>lt;sup>5</sup> The last four digits of a social security number are not generally considered private information. For example, Federal Rule of Civil Procedure 5.2(a)(1) provides that filings on an public docket may include "the last four digits of a social-security number." Fed. R. Civ. P. 5.2(a)(1). Furthermore, 52 U.S.C. § 21083(c), which governs computerized statewide voter registration list requirements as part of the Help America Vote Act, states that the last four digits

EPIC challenged the states' collection of that voter data or their designation of that information as publicly available. Because the Commission has only requested public information from the states, EPIC could never show that a constitutional right to informational privacy – even if it were to exist – has been violated.<sup>6</sup>

of a social security number may be used as part of the voter registration process for an election for federal office without running afoul of the Privacy Act.

The *Reporters Committee* Court was explicit, however, that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as . . . the question of whether an individual's interest in privacy is protected by the Constitution." *Id.* at 762 n.13 (citing *Paul v. Davis*, 424 U.S. 693, 712-14 (1976) (no constitutional privacy right affected by publication of name of arrested but untried shoplifter)). Following this direction, courts have "repeatedly stressed that *Reporters Committee* is inapposite on the issue of those privacy interests entitled to protection under the United States Constitution." *A.A. v. New Jersey*, 176 F. Supp. 2d 274, 305 (D.N.J. 2002) (citing *E.B. v. Verniero*, 119 F.3d 1077, 1100 n.21 (3d Cir. 1997)), *aff'd in part, remanded in part sub nom. A.A. ex rel. M.M. v. New Jersey*, 341 F.3d 206 (3d Cir. 2003); *see also Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir. 1999) (holding that *Reporters Committee* did not establish a constitutional right to prevent disclosure).

In any event, the instant case may be distinguished on its facts. Here, the Commission requested only publicly available information from the states, and plaintiff has not pled, much less proved, that such information is restricted or available to the public only for limited access.

<sup>&</sup>lt;sup>6</sup> The Supreme Court's decision in *U.S. Department of Justice v. Reporters Committee* for Freedom of the Press, 489 U.S. 749 (1989), is not to the contrary. There, the Court held that for purposes of the Freedom of Information's Act's statutory limitation on the release of information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C), federal "rap sheets" need not be disclosed. The Court concluded that "[a]lthough much rap-sheet information is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited." Reporters Comm., 489 U.S. at 743. Additionally, the fact that there was a "web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information," id. at 764-65, combined with "the fact that most States deny the general public access to their criminal-history summaries," id. at 767, permitted an agency to withhold the requested information under FOIA.

## IV. A TEMPORARY RESTRAINING ORDER WOULD HARM THE PUBLIC INTEREST

A party seeking a temporary restraining order or preliminary injunction must also demonstrate "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Here, the public interest cuts against an injunction. The President charged the Commission with the important task of "study[ing] the registration and voting processes used in Federal elections." Exec. Order No. 13,799, § 3. The Commission must prepare a report that identifies laws that either enhance or undermine the American people's confidence in the integrity of the voting processes used in Federal elections. The Commission must also investigate "those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting." *Id*.

As a necessary first step toward achieving these objectives, the Commission has begun to request information from the states, to be provided on a voluntary basis. EPIC seeks to enjoin these first steps, which will prevent the Commission from even beginning its work. The public interest lies in favor of allowing the Commission to begin collecting data so it can accomplish its important mission.

## **CONCLUSION**

For the foregoing reasons, the Court should deny EPIC's emergency motion for a temporary restraining order.

Dated: July 5, 2017

Respectfully submitted,

CHAD A. READLER Acting Assistant Attorney General Civil Division

BRETT A. SHUMATE Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO Deputy Director

/s/ Carol Federighi
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Counsel for Defendants

#### **Presidential Commission on Election Administration**

#### Background:

The Presidential Commission on Election Administration was created by Executive Order on March 28, 2013. The mission of the Commission is to identify best practices and otherwise make recommendations to promote the efficient administration of elections in order to ensure that all eligible voters have the opportunity to cast their ballots without undue delay, and to improve the experience of voters facing other obstacles in casting their ballots, such as members of the military, overseas voters, voters with disabilities, and voters with limited English proficiency. The EO states that the Commission shall be composed of not more than nine members appointed by the President.

The EO tasks GSA with providing the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission on a reimbursable basis

## **Executive Summary:**

Feb. 12, 2013: In the State of the Union Address, President Obama announced that he was going to create a non-partisan commission to improve the voting experience in America.

March 28, 2103: President Obama signs Executive Order 13639 creating the Presidential Commission on Election Administration. The White House announces that the bi-partisan election commission will be co-chaired by Bob Bauer and Ben Ginsberg. The co-chairs have not been officially appointed.

April 2013: Mark Nejbauer (FAS) is detailed to the Commission as the Operations Director/ Designated Federal Official (DFO). Greg Romano will serve as Communications Coordinator for the Commission. Audrey Brooks from OAS is assigned as the CMO for GSA.

May 2013: The co-chairs identify an expert to serve as Senior Research Director for the Commission. The Senior Research Director will be hired as an expert/consultant by GSA but he cannot be hired until after the Commission charter is filed. Five potential members have been vetted by the White House and GSA. The two co-chairs have not been vetted. Two members will serve as Representative and will not need to be vetted.

May 2, 2013: Meeting at White House with Steve Croley (Deputy Counsel to the President) and David Sandler (Associate Counsel to the President). Discussion topics include hiring a public affairs firm, travel, and gift acceptance authority.

May 8, 2013: The Senior Research Director signs gratuitous services agreement to allow him to participate in meetings with the co-chairs and the DFO.

May 10, 2013: OGC confirms that the White House is going to revise the Executive Order to increase membership on the Commission from nine to ten members. The FACA Charter has not been filed but it is being finalized. The Charter will have to be amended if the EO is revised. It may be prudent to wait until the Executive Order is amended to file the Charter since it would have to be amended to reflect the new terms of the Order.

May 15, 2013: Meeting scheduled at White House with Co-Chairs, White House Counsel, and GSA to discuss issues identified by the Co-Chairs.

#### **Discussion Points:**

- FACA compliance and organizational chart (i.e. Technical Advisory Steering Committee)
   Space for Commission. The located has been identified (1776 G Street) but it has not been determined who will pay for the Space. OGP is currently occupying the space but will move out
- 3. Administrative support for Mark Nejbauer.

## Initial Sections to be completed in the FACA Database

Be sure to click the "Save" link after making changes.

Section	Data Field(s)	Required?
<b>General Information</b>	Most of this information is updated automatically from	
	changes made elsewhere in the system. Below are	
	fields that require attention.	
	Decision Maker Information	No
	Specific Establishment Authority	Yes
	Effective Date of Authority	Yes
	Presidential (Yes or No)	Yes
	Committee Function	Yes
	Committee URL	No
	Presidential Appointments	Yes
	Max Number of Members	
	DFO Information	Yes
Interest Areas	Select which topics apply	Yes
Recommendations/	As some of these responses may be lengthy, it is	
Justifications	possible to cut n' paste from a word document into the data field.	
	Remarks	No
	How does the Cmt Accomplish its Purpose?	Yes
	How does the Cmt balance its Membership?	Yes
	How Frequent and relevant are the Cmt meetings?	Yes
	Why can't the advice or information this	Yes
	committee provides be obtained elsewhere?	
	Why is it necessary to close and/or partially close	Yes, if mtgs
	committee meetings?	will be closed

#### **GSA ADVISORY COMMITTEE**

## **FACA Meeting File Checklist**

## Presidential Advisory Commission on Election Integrity (PACEI)

Committee/Subcommittee:		
Meeting Date(s):		
Designated Federal Officer:		
Topic(s) Addressed:		
Cross-Reference Information:		
Topic Keywords/Project Numbers:		

#### **File Contents**

- 1. Was there an Administrative File created? (This is not a FACA file and is, therefore, maintained elsewhere)
- 2. Meeting File Checklist
- 3. Minutes of the Meeting, include the following:
  - (a) Federal Register Notice
  - (b) Final Meeting Agenda
  - (c) Final Roster of the Panel
  - (d) Sign-in Sheets
- 4. Transcript of the Meeting
- 5. Review and Background of the Meeting
- 6. Working Papers and Public Drafts of Reports
- 7. Bios of committee members
- 8. Comments (written and copies of oral testimony (if necessary)) from the Public
- 9. Final report of the Panel, with Transmittal Letter
- 10. Agency Response to the Final Report
- 11. Other Documents Made Available to or Prepared From or By the Panel
- 12. Comments or Edits from Reviewers

## **QUESTIONS PRESENTED BY THE CO-CHAIRS – MAY 20, 2013**

- 1. Before the Commission is Appointed
- (a) Can the Co-Chairs have an introductory call with individual Members of the Commission before the Commission is officially constituted and not have it fall within the FACA public access requirements?

Yes, it is possible for the Co-Chairs to call and talk to individuals about administrative issues before the Charter is filed.

(b) Can the Co-Chairs have a conference call with the full Commission before it is officially constituted to review the plans for the launch and answer any questions the Commissioners may have, not subject to FACA public access requirements?

Yes, the Co-Chairs can talk about administrative issues with the other Commissioners before the Charter is filed. They should not talk about the specific business of the Commission before the Charter is filed and the members appointed.

- 2. Administrative or Social Engagements
- (a) May the Co-Chairs have a meeting not subject to FACA open access requirements and 15-day notice requirements with the other Commissioners if it is administrative and non-substantive, to map out the agenda for a meeting, to address the logistics of travel, or to establish internal policies? Does it matter how many Commissioners are present?

Yes, pursuant to 41 CFR 102-3.160(b), members may meet solely to discuss administrative matters. It does not matter how many Commissioners are present at the meeting. However, if they need to adopt anything such as by-laws, there should be a majority of the members present.

(b) Are such meetings possible, again without application of public access and notice requirements, if the purpose is purely social: to celebrate a Commissioner's birthday, or to assemble for a meal after a hearing or a day of joint travel to a conference? Does it matter how many Commissioners are present?

Commissioners may socialize together but must be careful not to discuss any Commission business, other than administrative matters, during these social occasions. It does not matter how many Commissioners are present. It should be noted that appropriated funds should not be used for these social occasions.

- 3. Volunteer Advisers
- (a) May the Commission recruit a roster of volunteer advisers who offer without charge the benefit of their expertise?

There are 2 ways to obtain the advice of gratuitous "volunteer advisors" to work with the Commission. 1) FACA allows the Agency, in this case GSA, to obtain experts and consultants to work with the Commission pursuant to 5 U.S.C. 3109. That statute authorizes the head of an

agency to procure by contract the temporary services of experts and consultants. This is an easy process and GSA can work with the Commission to make these arrangements expeditiously. If there is no intent to compensate these volunteers, GSA would ask them to sign a gratuitous service agreement before they begin to assist the Commission to ensure that it is understood that they will not be compensated for their work. 2) The Commission may also obtain expert or consultant's advice by inviting them to submit papers or provide testimony at a public meeting. The Public may also submit information to the Commission in this manner at any time.

# (b) May the Commission pay for the travel of volunteer advisors who are attending meetings on behalf of the Commission (and assuming that the Commission would follow all the same procedures for scheduling and arranging for payment of the travel as members of the Commission were traveling)?

Yes, the volunteer advisors who are obtained as experts or consultants for the Commission pursuant to 5 U.S.C. 3109 may travel on behalf of the Commission. GSA would put them on invitational travel orders and they would have the ability to travel in the same manner as other Commission members and other Federal employees. If a person has not been so obtained, and they are invited to testify or present a report to the Commission, GSA has the ability to put these invited speakers on invitational travel orders if it is determined that the invited speaker's presence is necessary because they are acting in a capacity that is directly related to, or in connection with, official activities of the government.

## c) Would the work product of the advisers, such as draft academic or technical advice or commentary, require publication under FACA?

The work products would certainly have to be retained as Records pursuant to the Presidential Records Act, Section 10(b) of FACA, and FACA regulations (41 CFR 102-3.175(e)). The purpose of Section 10(b) of the Act is to provide for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend the advisory committee meetings, ensures that interested parties have a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. Since FACA recognizes FOIA exemptions, there might be instances when a FOIA exemption may be applicable. The question whether any particular report must be released to the public is, therefore, fact specific.

# (d) Would the email traffic between or memos shared by these advisors also become subject to publication under FACA or the Presidential Records Act? Does it matter for purposes of the application of FACA if this email traffic or shared written material is copied to the staff or to individual Commissioners?

The records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist. Generally, these documents are posted on the website. Emails are not generally included on the website but may be Records if made or received by the Commission in connection with the transaction of public business by the Commission.

## 4. Subcommittees; Other Small Group Meetings of Commissioners

The Commission is likely to work through subcommittees of members who will take on specific assignments and facilitate the efficient achievement of the Commission's task over this short time period. All of the subcommittees will report to the full Committee and the full Committee will have occasion to review and debate the recommendations and work of the subcommittees in meetings or communications subject to FACA. The Co-Chairs will be members of all subcommittees or working closely with them.

## (a) What is the definition of a subcommittee – in other words, what is the limit on the number of Commissioners that may be on a subcommittee before it becomes the full Commission?

A subcommittee is defined in the FACA regulations as a group that reports to an advisory committee and not directly to a Federal officer or agency. (41 CFR 102-3.25) It is merely a subgroup of the full Commission. There is no limitation in the FACA statute or the FACA regulations on the number of subcommittee members. We would suggest, however, that the subcommittees consist of less than a majority of the members of the Commission so that there cannot be an argument that you have, in fact, held a full Commission meeting which should have been noticed in the Federal Register and for which the public is invited to participate.

## (b) Is there any limit on the number of subcommittees that the Commission may form for this purpose?

There is no limitation on the number of subcommittees that may be formed. We do note that the FACA Regulations require that the subcommittees be approved and formed by GSA. (41 CFR 102-3.35) The DFO of the Commission will receive the request for a subcommittee, note the membership of that subcommittee, and notice it in the records of the Commission. No other GSA official is involved with the creation or recognition of a subcommittee. There is no problem with GSA approving as many subcommittees as you may wish to create.

## (c) Is there any other limit or restriction under FACA that subcommittees may have to observe in their work?

If the subcommittee meetings are open to the public, you would follow the same rules that you would follow for full Commission meetings – notice to the public in the Federal Register, the Designated Federal Official's (DFO) presence at all meetings, minutes kept, records retention etc. If the subcommittee meetings are not to be open to the public, you do not have to follow the public notice and open meeting requirements. However, all of the other rules would be applicable – the DFO would have to be in attendance, minutes kept, records would be created etc. It is also noted that all reports and recommendations formulated at the subcommittee level must be fully reported to and considered by the full Commission.

(d) May the Commission meet in smaller groups, on the model of subcommittee meetings but less formally, for purposes of discussing a specific issue (long lines, overseas voting, etc), if the purpose of such discussions is to prepare for public meetings or for the writing of the final recommendations that will be debated and published subject to FACA?

Yes, pursuant to 41 CFR 102-3.160, a smaller group of Commissioners may meet to conduct preparatory work for the full Commission. It does not require the same steps as a formal meeting.

## 5. Meetings and Conferences with Interested Groups

The Commission is receiving invitations to attend, in a variety of settings, sessions with groups and interested stakeholders. The full Commission cannot attend all such meetings; but we wish to accommodate as many of these requests as possible to enable us to collect valuable information and hear views, and to afford as much access as possible to the Commission for those interested in its work. By and large, the Commissioners attend to hear views, but they may be asked to make brief remarks and are invited to ask questions.

The Commission may also wish to convene such meetings, following the same format, but in this instance, the Commission is asking a group, such as a group of state and elected officials or an advocacy group, to prepare a presentation and answer questions in a more informal setting.

(a) May the Co-Chairs and a number of other Commissioners, but not the full Commission, accepted an invitation to a meeting of the National Association of Secretaries of State or the Lawyers Committee for Civil Rights Under Law or similar groups and attend without triggering FACA public access requirements?

Yes, Co-Chairs and Commissioners may attend such meetings without triggering FACA public access requirements. Individuals can make brief remarks, but should refrain from speaking on behalf of the Commission. Commission members attending a meeting can and should ask as many questions as they need to gather information to inform their work.

(b) May the Co-Chairs and a number of other Commissioners, but not the full Commission, request a meeting with interested groups or stakeholders which would not be subject to FACA public access requirements if the purpose is to do what the Commission would normally do at conferences to which its members are invited: collect information, ask for views, and take the opportunity to ask questions?

According to the FACA Regulations, a public meeting is defined as any gathering of Advisory Committee members (whether in person or through electronic means) held with the approval of an agency for the purpose of deliberating on the substantive matters upon which the Advisory Committee provides advice or recommendations. (41 CFR 102-3.25) Consequently, if the Commission or a subcommittee of the Commission calls a public meeting or invites an interested group or stakeholders to provide information, or its views, or to answer questions for the Commission, you have not invoked FACA, as long as the Commission is in a fact finding, information gathering mode, and is not deliberating on substantive matters.

If, however, the Commissioners or subcommittee members have a data gathering/fact finding session, records and notes must be kept. It is also advisable for the DFO to be in attendance. DFO attendance can be by conference call or teleconference. This is required by law because any information that is gained during these sessions that is incorporated into the final report must be included in the record and a trail where the information was derived must be maintained. 12 Op. O.L.C. 73, April 29, 1988.

It is a requirement of FACA that information presented to a subcommittee be presented to the entire body by the subcommittee, with recognition of the source of the information, so that all members have access to the information upon which a decision could be formulated.

There is nothing in the FACA statute or regulations which would require that all documents received are posted on the Commission website. However, the information which has been provided will be a Record. Section 10(b) of FACA requires that the public have access to any information that is made available to or prepared for or by each advisory committee. That includes all information that is provided to or by the subcommittee. While the information does not have to be posted on the website, it must be made available if requested by any interested party. If the information is not posted on the website, it can be made available at a public location for the interested parties to obtain access.

# (c) Is it relevant under FACA for purposes of either (a) or (b) if the Commission keeps a record of these meetings and acknowledges the contributions of these groups, on its website or in the final report or both?

It is a requirement of Section 10(b) of FACA that a record be maintained of information that is gathered in fact finding sessions as well as full Commission meetings. There is not a requirement that this information be published on the website or specifically incorporated in the final report. Nor is there a requirement that formal recognition be given either on the website or in the final report. FACA is silent on this issue. It is common practice, however, that recognition be given in the final report. Keeping notes or giving recognition does not trigger the FACA notice and access requirements.

# (d) Does it matter for purposes of FACA under either (a) or (b) how many Commissioners other than the Co-Chairs attend? For example, is it relevant that the group attending is less than half of the Commission?

No, it is not necessary for less than half of the members to attend. As long as they are fact finding, and information gathering they have not invoked FACA. However, if the Commissioners meet and begin to deliberate on substantive issues, they have held a meeting which should have been noticed in the Federal Register. This would be impermissible.

## (e) Is it relevant for FACA purposes if these meetings are scheduled by and attended by established subcommittees, including the Co-Chairs?

The question is not how many members attend but the scope of the meeting. If they are still conducting fact finding, and information gathering, it doesn't matter if they are all in attendance. What will trigger FACA is the nature of the Commission activity which is being conducted.



subsidiary's liabilities under applicable accounting standards. The Federal Reserve used information collected on the Capital and Asset Report for Foreign Banking Organizations (FR Y–7Q), the FR Y–9C and the FR XX–1 to calculate liabilities of these institutions.

The Board granted a request from one financial company to use an accounting standard or method of estimation other than GAAP to calculate liabilities. The requesting company is an insurance company that reports financial information under Statutory Accounting Principles ("SAP"). The Board approved a method of estimation for this company that is based on line items from SAP reports, with adjustments to reflect certain differences in accounting treatment between GAAP and SAP.

By order of the Board of Governors of the Federal Reserve System, acting through the Director of Supervision and Regulation under delegated authority, June 28, 2017.

#### Ann E. Misback,

Secretary of the Board.

[FR Doc. 2017-14011 Filed 7-3-17; 8:45 am]

BILLING CODE 6210-01-P

## GENERAL SERVICES ADMINISTRATION

[Notice-MK-2017-01; Docket No. 2017-0002; Sequence 11]

#### The Presidential Commission on Election Integrity (PCEI); Upcoming Public Advisory Meeting

**AGENCY:** Office of Government-wide Policy (OGP), General Services Administration (GSA).

**ACTION:** Meeting notice.

**SUMMARY:** The Presidential Advisory Commission on Election Integrity (Commission), a Federal Advisory Committee established in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. App., and Executive Order 13799, (https:// www.federalregister.gov/documents/ 2017/05/16/2017-10003/establishmentof-presidential-advisory-commission-onelection-integrity) will hold its first meeting on Wednesday, July 19, 2017. This meeting will consist of a ceremonial swearing in of Commission members, introductions and statements from members, a discussion of the Commission's charge and objectives, possible comments or presentations from invited experts, and a discussion of next steps and related matters.

**DATES:** *Meeting Date:* The first Commission meeting will be held on Wednesday, July 19, 2017, from 11:00

a.m., Eastern Daylight Time (EDT) until no later than 5:00 p.m., EDT.

ADDRESSES: The meeting will be held at the Eisenhower Executive Office Building, Room 350, located at 1650 Pennsylvania Avenue NW., Washington, DC 20502. It will be open to the public through livestreaming on https://www.whitehouse.gov/live.

## FOR FURTHER INFORMATION CONTACT: $\ensuremath{\mathrm{To}}$

obtain information about the Commission or to submit written comments for the Commission's consideration, contact the Commission's Designated Federal Officer, Andrew Kossack, via email at *ElectionIntegrityStaff@ovp.eop.gov* or telephone at 202–456–3794. Please note the Commission may post written comments publicly, including names and contact information, in accordance with the provisions of FACA. There will not be oral comments from the public at this initial meeting.

The Commission will provide individuals interested in providing oral comments the opportunity to do so at subsequent meetings. Requests to accommodate disabilities with respect to livestreaming or otherwise should also be sent to the email address listed above, preferably at least 10 days prior to the meeting to allow time for processing.

# SUPPLEMENTARY INFORMATION: The Commission was established in accordance with E.O. 13799 of March 11, 2017, the Commission's charter, and the provisions of FACA. The Commission will, consistent with applicable law and E.O. 13799, study the registration and voting processes used in Federal elections. The Commission shall be solely advisory and shall submit a report to the President of the United States that

a. Those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections;

identifies the following:

- b. those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of voting processes used in Federal elections; and
- c. those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting.

Dated: June 30, 2017.

#### Jeffrey A. Koses,

Director, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2017-14210 Filed 7-3-17; 8:45 am]

BILLING CODE 6820-61-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## **Centers for Disease Control and Prevention**

[30Day-17-1146]

## Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to omb@cdc.gov. Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.



July 3, 2017

Andrew Kossack Designated Federal Officer Presidential Advisory Commission on Election Integrity 1600 Pennsylvania Avenue, NW Washington, DC 20500

The Honorable Donald F. McGahn II White House Counsel 1600 Pennsylvania Avenue, NW Washington, DC 20500

Marcia L. Kelly Director, Office of Administration 1600 Pennsylvania Avenue, NW Washington, DC 20500

Dear Mr. Kossack, Mr. McGahn, and Ms. Kelly,

Pursuant to Section 10(b) of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. Appendix § 10(b), the Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") requests that you produce the following documentary materials of the Presidential Advisory Commission on Election Integrity (the "Commission"):

- 1. All emails since May 11, 2017 relating to the Commission's establishment, organization, operation, or work sent from or to the Commission's Chair, Vice Chair, other Commission members, or any federal employee (including special government employees) providing support to the Commission.
- 2. All other documentary materials created or received since May 11, 2017, including but not limited to records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, or agenda, relating to the Commission's establishment, organization, operation, or work that were made available to, or prepared by, the Commission's Chair, Vice Chair, other Commission members, or any federal employee (including special government employees) providing support to the Commission.

Please search for all documentary materials responsive to this request in all records systems and in all mediums and formats. As required by law, please include within your search responsive files and emails in the personal custody of the Chair, Vice Chair, other Commission members, and relevant federal employees, including in personal and state and local government email accounts, to the extent they are reasonably likely to include responsive records. *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016).

Andrew Kossack Hon. Donald F. McGahn Marcia L. Kelly July 3, 2017

Please confirm that the Chair, Vice Chair, other Commission members, and all other federal employees (including special government employees) providing support to the Commission have been provided a federal government email address and have been instructed to use only that email address for communications related to the Commission. Please also confirm that any emails related to the Commission sent from or to the Chair, Vice Chair, other Commission members, and all other federal employees (including special government employees) providing support to the Commission from a non-federal government email account have been forwarded to a federal government email address within 20 days, as required by the Presidential Records Act, 44 U.S.C. § 2209, the Federal Records Act, 44 U.S.C. § 2911, and other applicable laws.

If you determine that any responsive documentary materials, or portions thereof, are exempt from disclosure, please provide an index of those materials at the time you produce all other responsive materials. Please include in the index a description of the materials or portions thereof withheld and the justifications for doing so.

As required by FACA, please produce the materials and answers responsive to the above requests sufficiently in advance of the Commission's first meeting on July 19, 2017 to permit adequate time for review, and in all events no later than July 14, 2017. *See Food Chem. News v. Dep't of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992). The Lawyers' Committee will treat a failure to respond to this request or to provide all responsive documents by July 14, 2017 as a breach of the Commission's obligations under FACA.

If you have any questions or require any additional information, please do not hesitate to contact me. Thank you very much for your assistance.

## Sincerely,

/s/ Kristen Clarke

Kristen Clarke
Jon Greenbaum
Ezra Rosenberg
Marcia Johnson-Blanco
Lawyers' Committee for Civil Rights Under Law

John A. Freedman
Robert N. Weiner
R. Stanton Jones
Daniel F. Jacobson
ARNOLD & PORTER KAYE SCHOLER
Counsel for the Lawyers' Committee for Civil
Rights Under Law

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Civil Action No. 1:17-cv-1320 (CKK)

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.

## **DECLARATION OF KRIS W. KOBACH**

- I, Kris W. Kobach, declare as follows:
- 1. I am the Secretary of State of Kansas, having served in that position since 2011. I am also the Vice-Chair of the Presidential Advisory Commission on Election Integrity (the "Commission"), which the President established on May 11, 2017, pursuant to Executive Order 13799. The Commission is charged with studying the registration and voting processes used in federal elections and submitting a report to the President that identifies laws, rules, policies, activities, strategies, and practices that enhance or undermine Americans' confidence in the integrity of the federal election process.
- 2. The information provided in this declaration is based on my personal knowledge and upon information provided to me in my official capacity as Vice-Chair of the Commission.
- 3. The Commission was established within the Executive Office of the President and is chaired by the Vice President. The membership, not more than fifteen, is appointed by the President. The members of the Commission come from federal, state, and local jurisdictions

across the political spectrum. The Commission, which is solely advisory, is charged with submitting a report to the President containing its findings and recommendations. The duties of the Commission are set forth in Executive Order 13799 (attached as Exhibit 1) and the Commission's Charter (attached as Exhibit 2). Pursuant to the Charter, the records of the Commission and any subcommittees shall be maintained pursuant to the Presidential Records Act of 1978.

- 4. In furtherance of the Commission's mandate, I directed that identical letters (with different addressees) be sent to the secretaries of state or chief election officers of each of the fifty states and the District of Columbia. The letters solicit the views and recommendations of the secretaries of state and request their assistance in providing to the Commission publiclyavailable voter roll data to enable the Commission to fully analyze vulnerabilities and issues related to voter registration and voting. Specifically, I asked for the following data, "if publicly available under the laws of your state": full first and last names of registrants; middle names or initials if available; addresses; dates of birth; political party (if recorded); last four digits of social security numbers; voter history (elections voted in) from 2006; active/inactive status; cancelled status; information regarding prior felony convictions; information regarding voter registration in another state; military status; and overseas citizen information. The information requested is similar to the information that states are required to maintain and to make available for public inspection under the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA). See, e.g., 52 U.S.C. §§ 20507(i), 21083. The letter I sent to the Secretary of State of Alabama, which is representative of all the letters, is attached as Exhibit 3.
- 5. In these letters, I requested that the states respond by July 14, 2017, and described two methods for responding. I intended that narrative responses, not containing voter roll data,

be sent via email to the address provided in the letter. This email is a White House email address (in the Office of the Vice President) and subject to the security protecting all White House communications and networks. For voter roll data, I intended that the states use the Safe Access File Exchange ("SAFE"), which is a secure method of transferring large files up to two gigabytes (GB) in size. SAFE is a tested and reliable method of secure file transfer used routinely by the military for large, unclassified data sets. It also supports encryption by individual users. My letters state that "documents" submitted to the Commission will be made available to the public. That refers only to the narrative responses. With respect to voter roll data, the Commission intends to de-identify any such data prior to any public release of documents. In other words, the voter rolls themselves will not be released to the public by the Commission. The Commission intends to maintain the data on the White House computer system.

6. To my knowledge, as of July 5, 2017, no Secretary of State had yet provided to the Commission any of the information requested in my letter. I have read media reports that numerous states have indicated that they will decline to provide all or some portion of the information, in some cases because individual state law prohibits such transfer of information. However, it is my belief that there are inaccuracies in those media reports with respect to various states.

7.	I declare under penalty of perjury that the foregoing is true and correct to the best
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of my knowle	edge.

\*\*\*

Executed this 5th day of July 2017.

Kris W. Kobach

## EXHIBIT 1



Federal Register

Vol. 82, No. 93

Tuesday, May 16, 2017

### **Presidential Documents**

Title 3—

Executive Order 13799 of May 11, 2017

#### The President

# **Establishment of Presidential Advisory Commission on Election Integrity**

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote fair and honest Federal elections, it is hereby ordered as follows:

**Section 1.** *Establishment.* The Presidential Advisory Commission on Election Integrity (Commission) is hereby established.

- **Sec. 2**. *Membership*. The Vice President shall chair the Commission, which shall be composed of not more than 15 additional members. The President shall appoint the additional members, who shall include individuals with knowledge and experience in elections, election management, election fraud detection, and voter integrity efforts, and any other individuals with knowledge or experience that the President determines to be of value to the Commission. The Vice President may select a Vice Chair of the Commission from among the members appointed by the President.
- **Sec. 3.** *Mission.* The Commission shall, consistent with applicable law, study the registration and voting processes used in Federal elections. The Commission shall be solely advisory and shall submit a report to the President that identifies the following:
- (a) those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections;
- (b) those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections; and
- (c) those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting.
- Sec. 4. Definitions. For purposes of this order:
- (a) The term "improper voter registration" means any situation where an individual who does not possess the legal right to vote in a jurisdiction is included as an eligible voter on that jurisdiction's voter list, regardless of the state of mind or intent of such individual.
- (b) The term "improper voting" means the act of an individual casting a non-provisional ballot in a jurisdiction in which that individual is ineligible to vote, or the act of an individual casting a ballot in multiple jurisdictions, regardless of the state of mind or intent of that individual.
- (c) The term "fraudulent voter registration" means any situation where an individual knowingly and intentionally takes steps to add ineligible individuals to voter lists.
- (d) The term "fraudulent voting" means the act of casting a non-provisional ballot or multiple ballots with knowledge that casting the ballot or ballots is illegal.
- **Sec. 5.** Administration. The Commission shall hold public meetings and engage with Federal, State, and local officials, and election law experts, as necessary, to carry out its mission. The Commission shall be informed by, and shall strive to avoid duplicating, the efforts of existing government entities. The Commission shall have staff to provide support for its functions.

- **Sec. 6**. *Termination*. The Commission shall terminate 30 days after it submits its report to the President.
- **Sec. 7.** *General Provisions.* (a) To the extent permitted by law, and subject to the availability of appropriations, the General Services Administration shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission on a reimbursable basis.
- (b) Relevant executive departments and agencies shall endeavor to cooperate with the Commission.
- (c) Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (the "Act"), may apply to the Commission, any functions of the President under that Act, except for those in section 6 of the Act, shall be performed by the Administrator of General Services.
- (d) Members of the Commission shall serve without any additional compensation for their work on the Commission, but shall be allowed travel expenses, including per diem in lieu of subsistence, to the extent permitted by law for persons serving intermittently in the Government service (5 U.S.C. 5701–5707).
  - (e) Nothing in this order shall be construed to impair or otherwise affect:
  - (i) the authority granted by law to an executive department or agency, or the head thereof; or
  - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (f) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (g) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Aur Danny

THE WHITE HOUSE, May 11, 2017.

## EXHIBIT 2

#### **CHARTER**

#### PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY

- 1. **Committee's Official Designation**. Presidential Advisory Commission on Election Integrity ("Commission").
- 2. **Authority**. The Commission is established in accordance with Executive Order 13799 of May 11, 2017, "Establishment of a Presidential Advisory Commission on Election Integrity," ("Order") and the provisions of the Federal Advisory Committee Act ("FACA"), as amended (5 U.S.C. App.).
- 3. **Objectives and Scope of Activities**. The Commission will, consistent with applicable law and the Order, study the registration and voting processes used in Federal elections. The Commission shall be solely advisory and shall submit a report to the President of the United States ("President") that identifies the following:
  - a. those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections;
  - b. those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of voting processes used in Federal elections; and
  - c. those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting.
- 4. **Description of Duties**. The Commission will function solely as an advisory body.
- 5. **Agency or Official to Whom the Committee Reports**. The Commission shall provide its advice and recommendations to the President.
- 6. **Agency Responsible for Providing Support**. The General Services Administration ("GSA") shall provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission, to the extent permitted by law and on a reimbursable basis. However, the President's designee will be responsible for fulfilling the requirements of subsection 6(b) of the FACA.
- 7. **Estimated Annual Operating Costs and Staff Years**. The estimated annual costs to operate the Commission are approximately \$250,000 in FY2017 and approximately \$250,000 in FY2018, as needed, including approximately three full-time equivalent employees (FTEs) over the duration of the Commission.
- 8. **Designated Federal Officer**. Pursuant to 41 CFR § 102-3.105 and in consultation with the chair of the Commission, the GSA Administrator shall appoint a full-time or part-time federal employee as the Commission's Designated Federal Officer ("DFO"). The DFO will approve or

call all Commission meetings, prepare or approve all meeting agendas, attend all Commission meetings and any subcommittee meetings, and adjourn any meeting when the DFO determines adjournment to be in the public interest. In the DFO's discretion, the DFO may utilize other Federal employees as support staff to assist the DFO in fulfilling these responsibilities.

- 9. **Estimated Number and Frequency of Meetings**. Meetings shall occur as frequently as needed, called, and approved by the DFO. It is estimated the Commission will meet five times at a frequency of approximately 30-60 days between meetings, subject to members' schedules and other considerations.
- 10. **Duration and Termination**. The Commission shall terminate no more than two (2) years from the date of the Executive Order establishing the Commission, unless extended by the President, or thirty (30) days after it presents its final report to the President, whichever occurs first.

#### 11. Membership and Designation.

- (a) The Vice President shall chair the Commission, which shall be composed of not more than fifteen (15) additional members.
- (b) Members shall be appointed by the President of the United States and shall include individuals with knowledge and experience in elections, election management, election fraud detection, and voter integrity efforts, and any other individuals with knowledge or experience determined by the President to be of value to the Commission. Members of the Commission may include both regular Government Employees and Special Government Employees.
- (c) The Vice President may select a Vice Chair from among those members appointed by the President, who may perform the duties of the chair if so directed by the Vice President. The Vice President may also select an executive director and any additional staff he determines necessary to support the Commission.
- (d) Members of the Commission will serve without additional compensation. Travel expenses will be allowed, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service (5 U.S.C. 5701-5707), consistent with the availability of funds.
- 12. **Subcommittees**. The Chair of the Commission, in consultation with the DFO, is authorized to create subcommittees as necessary to support the Commission's work. Subcommittees may not incur costs or expenses without prior written approval of the Chair or the Chair's designee and the DFO. Subcommittees must report directly to the Commission, and must not provide advice or work products directly to the President, or any other official or agency.
- 13. **Recordkeeping**. The records of the Commission and any subcommittees shall be maintained pursuant to the Presidential Records Act of 1978 and FACA.
- 14. **Filing Date**. The filing date of this charter is June 23, 2017.

## EXHIBIT 3

### **Presidential Advisory Commission on Election Integrity**

June 28, 2017

The Honorable John Merrill Secretary of State PO Box 5616 Montgomery, AL 36103-5616

Dear Secretary Merrill,

I serve as the Vice Chair for the Presidential Advisory Commission on Election Integrity ("Commission"), which was formed pursuant to Executive Order 13799 of May 11, 2017. The Commission is charged with studying the registration and voting processes used in federal elections and submitting a report to the President of the United States that identifies laws, rules, policies, activities, strategies, and practices that enhance or undermine the American people's confidence in the integrity of federal elections processes.

As the Commission begins it work, I invite you to contribute your views and recommendations throughout this process. In particular:

- 1. What changes, if any, to federal election laws would you recommend to enhance the integrity of federal elections?
- 2. How can the Commission support state and local election administrators with regard to information technology security and vulnerabilities?
- 3. What laws, policies, or other issues hinder your ability to ensure the integrity of elections you administer?
- 4. What evidence or information do you have regarding instances of voter fraud or registration fraud in your state?
- 5. What convictions for election-related crimes have occurred in your state since the November 2000 federal election?
- 6. What recommendations do you have for preventing voter intimidation or disenfranchisement?
- 7. What other issues do you believe the Commission should consider?

In addition, in order for the Commission to fully analyze vulnerabilities and issues related to voter registration and voting, I am requesting that you provide to the Commission the publicly-available voter roll data for Alabama, including, if publicly available under the laws of your state, the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social

security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.

You may submit your responses electronically to <u>ElectionIntegrityStaff@ovp.eop.gov</u> or by utilizing the Safe Access File Exchange ("SAFE"), which is a secure FTP site the federal government uses for transferring large data files. You can access the SAFE site at <a href="https://safe.amrdec.army.mil/safe/Welcome.aspx">https://safe.amrdec.army.mil/safe/Welcome.aspx</a>. We would appreciate a response by July 14, 2017. Please be aware that any documents that are submitted to the full Commission will also be made available to the public. If you have any questions, please contact Commission staff at the same email address.

On behalf of my fellow commissioners, I also want to acknowledge your important leadership role in administering the elections within your state and the importance of state-level authority in our federalist system. It is crucial for the Commission to consider your input as it collects data and identifies areas of opportunity to increase the integrity of our election systems.

I look forward to hearing from you and working with you in the months ahead.

Sincerely,

Kis Kobach

Kris W. Kobach

Vice Chair

Presidential Advisory Commission on Election Integrity



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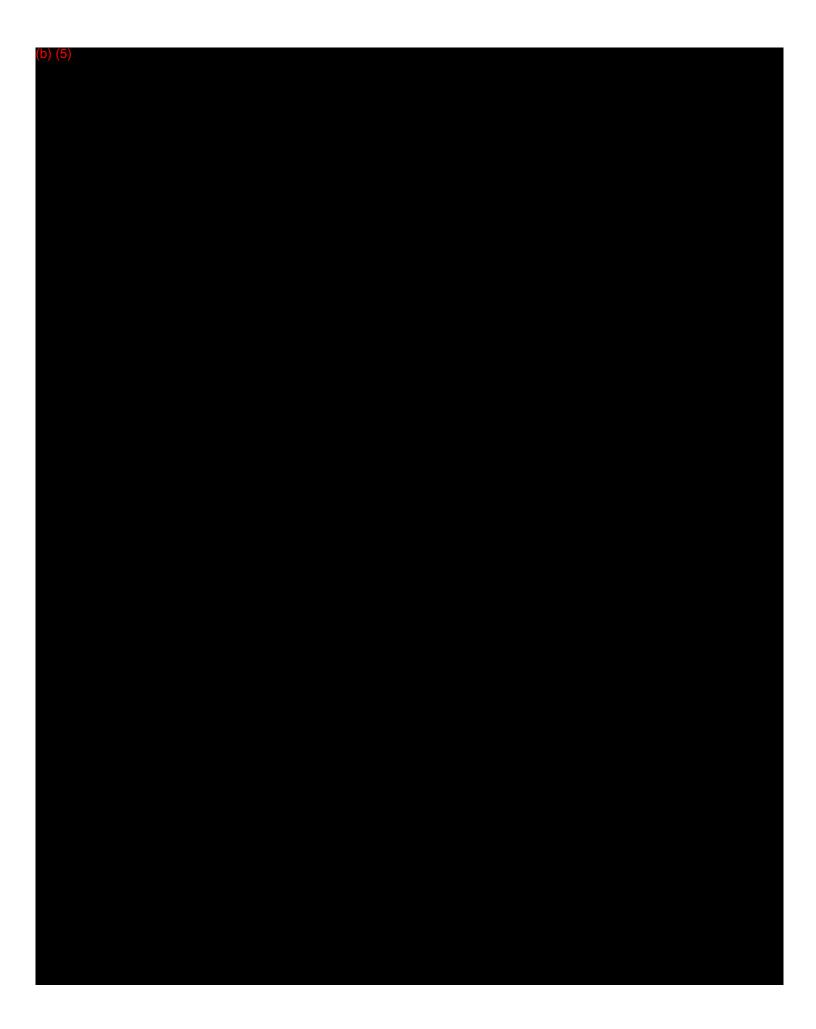
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#### Mellon Auditorium Federal Rates

Entire Facility - Weekday 10 hours (8am-2am) \$7,500.00

Entire Facility - Weekend 14 hours (8am-2am) \$12,000.00

Runner Rental (Floor Protection) \$500.00-per event

\*Security- (Base of the Scope of the Event) \$3,500-minimum

Surcharge Hour- (if outside core hours) \$900.00

Security Deposit- \$2,500.00

<sup>\*</sup>Hours must fall between 8:00AM-2:00AM. Access outside this window will be charged at \$900.00 per hour

<sup>\*\*</sup>Each client is responsible for protecting the floor during load-in and load-out. Protective runners must be place prior to the first vendor moving in. If the first vendor arrives without proper floor protection, they will be required to use that provided by the facility. An additional charge of \$500.00 will be billed to the authorized credit card. This charge will show up on your credit card statement as Event Emissary. If this fee is charged back or insufficient funds are available, this fee will be withheld from your security deposit.

<sup>\*\*\*</sup>At the time of the application, EE/DHS will perform a security assessment, to determine the level of service/cost required for the Event Host's specific event.

<sup>\*\*\*\*</sup>The balcony area on the 3rd floor of the Main Auditorium is restricted from use by attendees.

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER.

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, et al.,

Defendants.

Civil Action No. 17-1320 (CKK)

#### **ORDER**

(July 6, 2017)

The Court hereby sets a hearing on Plaintiff's [3] Motion for a Temporary Restraining Order, to be held at **4:00 P.M.** on **July 7, 2017**, in Courtroom 28A. Counsel should be prepared to discuss the following issues in particular:

- The ownership and control of all computer systems that have or will be used in the collection, storage, and transfer of data collected at the behest of the Presidential Advisory Commission on Election Integrity, including the computer systems that are associated with the website https://safe.amrdec.army.mil/safe/Welcome.aspx, the email address ElectionIntegrityStaff@ovp.eop.gov, and the "White House computer system," ECF No. 8-1, at 3.
- The services that have or will be provided by the General Services Administration for the Presidential Advisory Commission on Election Integrity.
- The involvement of Commissioner Christy McCormick and/or the Election Assistance Commission in the decision-making process of the Presidential Advisory Commission on Election Integrity.
- The manner and extent to which the Commission expects "[r]elevant executive departments and agencies . . . to cooperate with the Commission." Executive Order No. 13,799, 82 Fed. Reg. 22,389, 22,390 (May 11, 2017).
- The authority, if any, relied upon by the Presidential Advisory Commission on Election Integrity to systematically collect voter information.
- The harm, if any, that Plaintiff or its members would suffer given Defendants' representation that only publicly available data will be collected by the Presidential

Advisory Commission on Election Integrity.

• The harm, if any, that Defendants would suffer from conducting a Privacy Impact Assessment, and whether any factors make the disclosure of such a Privacy Impact Assessment not "practicable."

Furthermore, in undertaking its independent duty to assess its subject-matter jurisdiction over this action, *see NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 120 (D.C. Cir. 2008), the Court notes that the parties have not addressed informational standing in this case, despite Plaintiff's request for the public release of a Privacy Impact Assessment, *see Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir. 2016). Accordingly, the parties shall file supplemental briefing on this issue by **1:00 P.M.** on **July 7, 2017**, with each party limited to 3 pages. The parties should be prepared to discuss Plaintiff's standing to bring this suit at the hearing.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, et al.,

Defendants.

Civil Action No. 17-1320 (CKK)

#### **ORDER**

(July 5, 2017)

The Court is in receipt of Defendants' [8] Memorandum in Opposition to Plaintiff's Emergency Motion for a Temporary Restraining Order, and hereby instructs Defendants to respond to the following questions by **12:00 P.M.** on **Thursday, July 6, 2017**.

- 1) Who are the current members of the Presidential Advisory Commission on Election Integrity, and what are their affiliations?
- 2) If there are no current members who are officials of a federal agency, what is the likelihood that an official of a federal agency will become a member of the Presidential Advisory Commission on Election Integrity in the near future? Identify any likely members who are currently officials of a federal agency.
- 3) To what extent has or will the General Services Administration be involved in the collection and storage of data for the Presidential Advisory Commission on Election Integrity?
- 4) Who is the current operator of the website https://safe.amrdec.army.mil/safe/Welcome.aspx?
- 5) Who is responsible for collecting and storing data received via the website https://safe.amrdec.army.mil/safe/Welcome.aspx? Who will transfer that data to the Presidential Advisory Commission on Election Integrity?

So that Plaintiff may have an opportunity to review Defendants' responses, Plaintiff's reply shall be due by **2:00 P.M.** on **Thursday**, **July 6, 2017**.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

# Presidential Commission on Election Administration (PCEA) March 21, 2013 - February 21, 2014

#### Background

The Presidential Commission on Election Administration was established in accordance with EO 13639 of March 28, 2013 and EQ 13644, dated May 21, 2013, and the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App.

#### Objective

The committee identified best practices and made recommendations to promote the efficient administration of elections in order to ensure that eligible voters have the ability to cast their ballots without undue delay, and to improve the experience of voters facing other obstacles in casting their ballots, such as military, overseas voters, voters with disabilities, voters with limited English proficiency.

#### Members

Membership consisted of not more than ten members appointed by the President. Members were drawn from among distinguished individuals with knowledge about or experience in the administration of State or local elections, as well as representatives of successful customer service-oriented businesses, and other individuals with knowledge or experience determined by the President that was of value to the Commission. The President shall designated two members of the Commission to serve as Co-Chairs.

#### Committed Personnel Resources

Two full FTE were assigned to support the PCEA Committee throughout the time of its establishment at GSA.

#### Costs

The projected annual costs at the time of establishment to operate the Commission was \$500k in FY2013, and \$200k in FY2014 if necessary; including 2.0 staff years (FTE) of support for each fiscal year.

- Indirect cost for 2.0 full-time equivalents to manage the Commission and a
- Senior Research Director (new hire).
- Travel expenses
- The remaining costs included transcription
- Compensation for commission members was limited to reimbursement of travel expenses.

Actual Operating Costs – No records are currently available on actual operating costs for 2013 and 2014.

# Presidential Commission on Election Administration (PCEA) March 21, 2013 - February 21, 2014

#### Designated Federal Officer (DFO)

Mark Nejbauer served as the DFO for PCEA though out the duration of the committee's existence. Mark is a current employee at GSA and the most likely candidate to serve as the DFO should he agree to do so. Mark was informed about the new commission to determine his interest in fulfilling the DFO role for the Presidential Advisory Commission on Election Integrity Committee. Mark has not yet responded.

Mark's contact information:

Mark Nejbauer (BB) Budget Analyst mark.nejbauer@gsa.gov

Cell: (b) (6)

**Phone:** (703) 605-2994

1800 F ST NW WASHINGTON DC 20405-

Office of Budget

0001

(b) (6)

#### Members

Committee member composition consisted of 12 members who were selected by the President, two of which served as dual Co-chairs. All members were appointed by the President.

#### Meetings

The PCEA committee scheduled and held a total of 12 meetings to be held twice a month for the duration of the Commission. Meeting locations were Washington, DC, Cincinnati, Denver, Miami, and Philadelphia. One meeting was public conference call.

# The Presidential Commission on Election Administration U.S. General Services Administration Federal Advisory Committee Charter

- 1. Committee's Official Designation. Presidential Commission on Election Administration (Commission).
- 2. Authority. The Commission is being established in accordance with Executive Order 13639, dated March 28, 2013, and Executive Order 13644, dated May 21, 2013, and the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App.
- 3. Objectives and Scope of Activities. The Commission shall identify best practices and make recommendations to promote the efficient administration of elections in order to ensure that all eligible voters have the ability to cast their ballots without undue delay, and to improve the experience of voters facing other obstacles in casting their ballots. In preparing recommendations the Commission shall hold public meetings and engage Federal, State, and local officials, and nongovernmental organizations, as necessary to carry out its mission. Such best practices and recommendations shall include consideration of:
  - (a) The number, location, management, operation and design of polling places;
  - (b) Voting accessibility for ballots of uniformed and overseas voters;
  - (c) Training, recruitment, and number of poll workers;
  - (d) Efficient management of voter rolls and poll books;
  - (e) Voting machine capacity and technology;
  - (f) Ballot simplicity and voter education;
  - (g) Voting accessibility for individuals with disabilities, limited English proficiency and other special needs;
  - (h) Management of issuing and processing provisional ballots in the polling place on Election Day;
  - (i) Adequacy of contingency plans for natural disasters and other emergencies that may disrupt elections;
  - (i) Administration of absentee ballot programs, and
  - (k) Other issues that the Co-Chairs deem important for the efficient administration of elections.
- **4. Description of Duties.** The Commission shall be advisory in nature.
- 5. Agency or Official to Whom the Committee Reports. The Commission shall submit its recommendations in a final report to the President within six months of its first public meeting.
- 6. **Support.** The General Services Administration, Office of Government-wide Policy shall provide the Commission with such administrative services, funds, facilities, staff, equipment and other support services as may be necessary to carry out its mission to the extent permitted by law and within existing appropriations.

- 7. Estimated Annual Operating costs and Staff Years. The estimated annual costs to operate the Commission are \$500k in FY2013, and \$200k in FY2014 if necessary; including 2.0 staff years of support.
- 8. Designated Federal Officer. The Designated Federal Officer (DFO) is a full-time Federal staff employee. The DFO will approve or call all advisory committee and subcommittee meetings, prepare all meeting agendas, attend all committee and subcommittee meetings, adjourn any meeting when the DFO determines adjournment to be in the public interest, and chair meetings when directed to do so by the GSA, Associate Administrator of Government-wide Policy.
- 9. Estimated Number and Frequency of Meetings. 12 Meetings total, to be held twice a month for the duration of the Commission
- 10. Duration. The expected duration is less than one year.

15. Filing Date. May 21, 2013

- 11. **Termination.** The Commission shall terminate within 30 days after it presents its final report to the President, consistent with Executive Order 13639.
- 12. Membership and Designation. The Commission shall be comprised of not more than ten members appointed by the President from among distinguished individuals with knowledge about or experience in the administration of State or local elections, representatives of successful customer service-oriented businesses, as well as any other individuals with knowledge or experience determined by the President to be of value to the Commission. Members of the Commission may include a mix of Regular Government Employees, Special Government Employees or representative members. No member who is a federally registered lobbyist may serve on the Commission. The President shall designate two members of the Commission to serve as co-chairs. Members will serve without compensation, but travel expenses will be allowed.
- 13. Subcommittees. The Commission, in consultation with GSA, is authorized to create subcommittees as necessary to support the Commission's work. All such subcommittees must report directly to the Commission. The subcommittees must not provide advice or submit work products directly to the President or any official within GSA.
- **14. Recordkeeping.** The records of the Commission and the respective subcommittees or subgroups will be maintained pursuant to the Presidential Records Act of 1978 and FACA.

I I	
- d/ N/W/N	May 21, 2013
Dan Yangherlini Acting Administrator	Date





July 5, 2017

Andrew J. Kossack Associate Counsel Office of the Vice President Old Executive Office Building Washington, DC 20501

Dear Mr. Kossack:

I am pleased to advise you that you are hereby appointed to serve as the Designated Federal Officer for the Presidential Advisory Commission for Election Integrity (Commission), in accordance with §10 of the Federal Advisory Committee Act, as amended, 5 U.S.C. App and 41 CFR §102–3.105 and 102–3.120.

Please contact Ms. Audrey Brooks, Committee Management Officer for GSA, if you have any questions. She may be reached at (202) 205-5912 or at <a href="mailto:Audrey.Brooks@gsa.gov">Audrey.Brooks@gsa.gov</a>.

Sincerely,

Timothy O. Horne Acting Administrator

wotly D. House

# The President's Management Advisory Board U.S. General Services Administration By-Laws and Operating Procedures

The following By-Laws and Operating Procedures (the "By-Laws") will govern the operations of the President's Management Advisory Board (the "PMAB"). Funding and administrative support will be provided by the General Services Administration.

#### Section I: Functions, Objective, Organization and Operation

The functions of the PMAB are advisory only. Its objective is to provide the President and the President's Management Council (PMC) advice and recommendations on effective strategies for the implementation of best business practices on matters related to Federal Government management and operation, with a particular focus on productivity, the application of technology, and customer service. The PMAB shall provide its advice and recommendations, analysis, and information directly to the President or his delegate and to the President's Management Council (PMC). The President or his delegate may direct the PMAB to provide its analysis, information, advice and recommendations to any agency or other entity within the Federal Government. All executive departments, agencies, and offices shall provide information and assistance to the PMAB as the Chair may request for purposes of carrying out the PMAB's functions, to the extent permitted by law. The PMAB has been formed by the authority vested in the President of the United States by the Constitution and the laws of the United States of America. The Federal Advisory Committee Act 5 U.S.C. App. 2 §§ 1-16, as amended ("FACA"), governs the creation and operation of advisory committees within the Executive Branch of the Federal Government. In the event of any inconsistencies between the By-Laws and FACA (including its implementing regulations), the PMAB will carry out its Charter in accordance with FACA (including its implementing regulations), as the same may be amended from time to time.

#### **Section II: Members**

The PMAB shall consist of not more than 18 members, one of whom shall be the Deputy Director for Management of the Office of Management and Budget (DDM). The remaining 17 members shall be appointed by the President from among distinguished citizens from outside the Federal Government who are qualified on the basis of a proven record of sound judgment in leading or governing large, complex, or innovative private sector corporations or entities and a wealth of top-level business experience in the areas of executive management, audit and finance, human resources and compensation, customer service, streamlining operations, and technology. Each of these 17 members may be appointed as either a Special Government Employee or as a Representative Member, serving as a representative of his or her industry, trade group, public interest group or other organization or group. The composition of the PMAB shall reflect the views of diverse stakeholders. The Chair shall appoint an Executive Director, who shall be a full-time or permanent part-time Federal employee. The Executive Director shall serve as the Designated Federal Officer in accordance with the Federal Advisory Committee Act, as amended, 5 U.S.C. App. Each of the 17 members of the PMAB will be appointed by the President to serve a term of two years.

#### **Section III: Meetings**

- (A) In General. The PMAB shall meet at such regular intervals as necessary to carry out its duties. The PMAB is expected to meet at least three times per year at the call of the Chair with the approval of the Designated Federal Officer (the "DFO"), or at the call of the DFO. A PMAB meeting consists of a quorum of the Members (including the Chair) then serving on the PMAB. The DFO shall ensure compliance with the requirements of FACA and its implementing regulations. The Chair will preside at all meetings of the PMAB, unless the Administrator of the General Services Administration (GSA) or his / her designee directs the DFO to preside in accordance with FACA. Members who cannot attend meetings in person may participate by means of conference telephone or similar communications equipment if all Members can hear one another at the same time and members of the viewing public can hear them also.
- (B) **Notice**. GSA will publish a notice of each meeting in the *Federal Register* at least 15 calendar days before the meeting, unless there are exceptional circumstances in which case the reason will be included in the *Federal Register* notice. The notice will include (1) the name of the Committee; (2) the time, date, place, and purpose of the meeting; (3) a summary of the agenda and / or the topics to be discussed; (4) a statement as to whether all or part of the meeting will be open to the public and, if any part is closed, a statement as to why, citing the specific statutory provision that serves as a basis for closure; and (6) the name and telephone number of the DFO or Alternate DFO who may be contacted for additional information concerning the meeting. *Federal Register* Notices are processed through the GSA Regulatory Secretariat Division (MVCB) Office of Governmentwide Acquisition Policy.
- (C) **Agenda**. The Chair of the PMAB will draft an agenda for each meeting of the PMAB sufficiently in advance of the meeting to permit a copy or summary of the agenda to be published with the notice of the meeting. The DFO or Alternate DFO will distribute the agenda to the members before each meeting and will make available copies of the agenda to members of the public. Items for the agenda may be submitted to the Chair by any Member of the PMAB or by any member of the public.
- (D) **Quorum**. A quorum will consist of a simple majority of the Members (including the Chair) then serving on the PMAB.
- (E) **Voting**. A Member must attend a PMAB meeting either in person or by telephone to cast a vote. When a decision or recommendation of the PMAB is required, the Chair will request a motion for a vote. Any Member may make a motion for a vote and vote. No second after a proper motion will be required to bring any issue or recommendation to a vote. PMAB action based on a vote requires a simple majority of the votes cast at a meeting at which there is a quorum, except that formal advice or recommendations to the President requires two-thirds of the votes cast at a meeting at which there is a quorum. Formal advice is provided from PMAB to the President and the President's Management Council (PMC) on a wide range of issues related to the development of effective strategies for the implementation of best business practices to improve Federal Government management and operation, with a particular focus on productivity, the application of technology, and customer service.

- (F) **Open Meetings**. Unless otherwise determined in advance, all meetings of the PMAB will be open to the public either in person as space permits or via live webcast. Once an open meeting has begun, it may not be closed for any reason. If, during the course of an open meeting, matters inappropriate for public disclosure arise during discussion, the Chair will order such discussion to cease and will schedule the matter for closed session in accordance with FACA. All materials brought before, or presented to, the PMAB during an open meeting will be made available to the public for review during the meeting. All such materials also will be made available on the PMAB website as soon as practicable afterwards. The Chair of the PMAB may decide in advance to exclude oral public statements during a meeting. The meeting notice published in the *Federal Register* will invite written statements. The public may submit written statements to the PMAB at any time through the PMAB website or as directed by the *Federal Register* notice.
- (G) Activities Not Subject to Notice and Open Meeting Requirements. Consistent with FACA regulations, the following activities are excluded from the procedural requirements contained in Sections III(B) and III(F): (a) Preparatory work. Meetings of two or more PMAB Members or subcommittee members convened solely to gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting of the PMAB, or to draft position papers for deliberation by the PMAB; and (b) Administrative work. Meetings of two or more PMAB Members or subcommittee members convened solely to discuss administrative matters of the PMAB or to receive administrative information from a Federal officer or agency.
- (H) **Closed Meetings**. All or parts of meetings of the PMAB may be closed in limited circumstances in accordance with applicable law. Requests for closed meetings will be submitted in accordance with The Government in the Sunshine Act, and applicable FACA and Agency guidelines. After GSA General Counsel review, the appropriate GSA official must determine that closing the meeting is consistent with the provisions of the Government in the Sunshine Act. Consistent with Section III(B)(4), the notice of the PMAB meeting published in the *Federal Register* must include information on the closure.
- (I) **Information Gathering**. The PMAB may hold meetings to receive oral comments, recommendations, and expressions of concern from the public. The PMAB may hold meetings at open or closed session in accordance with the standards in the By-laws for closing meetings to the public. The Chair of the PMAB may specify reasonable guidelines and procedures for conducting orderly meetings, such as requirements for submitting requests to appear, written statements in advance, and placing limitations on the number of persons who may appear and the duration of their appearance.
- (J) **Minutes**. The DFO will assure the preparation of minutes of each meeting of the PMAB from either notes taken at the meeting itself or from the transcript/webcast of the meeting, and submit them to the Chair of the PMAB for certification of their accuracy. The minutes must be certified by the Chair of the PMAB within 90 calendar days of the meeting to which they relate. The DFO will distribute copies of the certified minutes to each Member. Minutes of open or closed meetings will be made available to the public, subject to the withholding of matters about which public disclosure would be harmful to the interests of the Government, industry, or others, and which are exempt from disclosure under the Freedom of Information Act. The minutes will include a list of the persons who were present at the meeting, and a complete and accurate

description of the matters discussed and the resolution, if any, made by the PMAB regarding such matters; and copies of all reports or other documents received, issued or approved by the PMAB at the meeting.

#### **Section IV: Officials**

- (A) **Chair.** The Chair of the PMAB shall be the Deputy Director for Management of the Office of Management and Budget, and serves at the sole discretion of the President to perform the duties specified in the Charter and the By-Laws. The Chair of the PMAB will work with the Executive Director/DFO to establish priorities, identify issues that should be addressed, and determine the level and types of staff and financial support required.
- (B) Executive Director/Designated Federal Officer. The Chair of the PMAB shall appoint an Executive Director, who shall also serve as the DFO. The DFO is designated by the Chair and serves as the Federal Government's agent for matters related to the PMAB's activities. Under FACA, the DFO must, among other things, approve or call all meetings of the PMAB, attend meetings, and adjourn meetings when he or she determines such adjournment is in the public interest. In addition, the DFO is responsible for providing adequate staff support to the PMAB, and performance of the following administrative functions: (1) notifying Members of the time and place for each meeting; (2) assuring the preparation of the minutes of all meetings of the PMAB and its subcommittees, as required by FACA; (3) attending to official correspondence; (4) maintaining official PMAB records, including subcommittee records, as required by law; (5) maintaining a website for the PMAB; (6) acting as the Board's agent to collect, validate and pay all vouchers for pre-approved expenditures of the PMAB authorized by law; and (7) preparing and handling all reports (except those required by section 6 of FACA), including the annual report of the PMAB required to be submitted to the GSA under the FACA regulations. An Alternate DFO may substitute for the DFO when necessary.
- (D) **Support Staff**. Pursuant to the Executive Order, GSA will provide support for the PMAB.

#### **Section V: Subcommittees.**

The PMAB Chair may establish such subcommittees as he/she deems necessary to support the PMAB's functions and may appoint Members to, and the Chairs of, any subcommittees so convened. The Chair of the PMAB will be an *ex officio* member of each subcommittee. Each subcommittee shall be established as stated in the Charter. Only Members of the PMAB will have the right to vote and make a motion for a vote in a subcommittee. No subcommittee will have any authority to provide advice or recommendations (1) directly to the President or any other agency or officer of the Federal Government or (2) to be adopted by the PMAB without discussion or consideration at an open meeting of the PMAB. All activities of the subcommittees will be in compliance with FACA, as applicable.

### **Section VI: Records**

The records of PMAB shall be handled in accordance with General Records Schedule 26, Item 2 or other approved agency records disposition schedule. These records shall be available for public inspection and copying, subject to the Freedom of Information Act, 5 U.S.C. 552.

# **Section VII: Expenses**

Expenses related to the operation of the PMAB in accordance with applicable law will be borne by GSA.

#### **Section VIII: Amendments**

The By-Laws may be amended from time to time by review of the Chair and the DFO as representative of the Agency.



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# IN THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; GENERAL SERVICES ADMINISTRATION: EXECUTIVE OFFICE OF THE PRESIDENT; OFFICE OF THE VICE PRESIDENT; OFFICE OF ADMINISTRATION; MICHAEL R. PENCE, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; KRIS W. KOBACH, IN HIS OFFICIAL CAPACITY AS VICE CHAIR OF THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; ANDREW KOSSACK, IN HIS OFFICIAL CAPACITY AS DESIGNATED FEDERAL OFFICER FOR THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; TIMOTHY R. HORNE, IN HIS OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION; MARCIA L. KELLY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF ADMINISTRATION,

Defendants.

Docket No. \_\_\_\_

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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#### INTRODUCTION

This case seeks to ensure public accountability and transparency in what could be one of the most consequential federal advisory committees ever created: the recently launched Presidential Advisory Commission on Election Integrity (the "Commission").

The Federal Advisory Committee Act ("FACA") demands no less. FACA imposes strict transparency requirements whenever the Executive Branch—including the President—seeks the advice or recommendations of a group that includes non-federal officials. Congress mandated that such advisory committees be "open to public scrutiny" out of particular concern that members of such committees could seek to "advance their own agendas" through the committee's work. *Cummock v. Gore*, 180 F.3d 282, 284-85 (D.C. Cir. 1999) (internal quotation marks omitted).

That is precisely the case here. President Trump has made clear that he seeks to use the Commission to validate his unsubstantiated claim that there were 3 to 5 million voters who illegally cast ballots in the 2016 Presidential election. The Commission's Vice Chair, Kris Kobach, is exploiting his role on the Commission to promote his candidacy for Governor of Kansas, including to generate campaign contributions. Moreover, Kobach is using the Commission to acquire a patina of respectability for his long-running efforts to suppress the vote of certain populations under the guise of preventing "voter fraud." Kobach is joined in this regard by other commission members such as former Ohio Secretary of State Ken Blackwell and former Justice Department official Hans von Spakovsky, who have a long history of attempting to suppress the vote. Kobach and these Commission members have already inflicted significant damage through the Commission. Their unprecedented request for sensitive voter information from States—following a Commission meeting held with no public notice, no public attendance,

and no access to the Commission's records—has led to scores of voters canceling their voter registrations. The need to conduct this Commission with the transparency required by FACA could not be more urgent or important.

But Defendants have already violated, and continue to violate, FACA's transparency requirements. FACA requires that the Commission publicly disclose of all its records and make of all its meetings open to the public. 5 U.S.C. app. II §§ 10(a)-(b). Defendants have ignored the request of Plaintiff Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee" or "Plaintiff") for the Commission's records. And Defendants have already held one Commission meeting that was improperly closed to the public, and they plan to hold another meeting on July 19, 2017 that is closed to the public—for which they will have not released the Commission's records beforehand.

The Commission's disregard of its transparency obligations begs the question: "What are they trying to hide?" Compl. Ex. I (tweet of President Trump discussing the Commission). The public, whose voting rights are at stake, has a right to know the Commission's activities, and it will be irreparably injured absent this Court's intervention.

The Lawyers' Committee satisfies all of the requisite elements for a TRO. The Lawyers' Committee is likely to succeed on the merits because Defendants have admitted that FACA applies to the Commission, and yet Defendants have not complied with FACA's requirements to produce the Commission's records in advance of its meetings, and to open the meetings to public attendance and participation. The Lawyers' Committee, and the public, will suffer irreparable harm because their statutory rights to receive the Commission's records prior to its meetings, and to participate in those meetings, cannot be satisfied after the fact. The balance of equities also weighs decisively in the Lawyers' Committee's favor because an injunction would impose no

harm on Defendants, and certainly not one that outweighs the harm to the Lawyers' Committee. And the requested relief serves the public interest in transparency and effectuates the principles that prompted Congress to enact FACA—principles that are paramount in this case given the potential consequences for American democracy of the Commission's work, given the strong evidence that the Commission has ulterior motives, and given the harm the Commission has already inflicted through its request for personal information of voters.

The Lawyers' Committee respectfully requests that this Court enter a temporary restraining order: (1) directing Defendants to produce records responsive to the Lawyers' Committee's request before the Commission's currently scheduled July 19 meeting; (2) requiring the Commission to open all meetings to in-person public attendance and participation; and (3) enjoining the Commission from holding the July 19 meeting, or any future meeting, until it has met its records and public access obligations under FACA.

#### FACTUAL BACKGROUND

# A. President Trump Creates a Commission to Support His Claim That Millions of Persons Voted Illegally in Presidential Election

On November 27, 2016, then-President-Elect Donald J. Trump declared that he would have won the popular vote, in addition to the electoral college, if not for millions of purported illegal votes cast for his opponent. Compl. Ex. A.

Though most elected officials on both sides of the aisle rejected this claim, along with virtually every political scientist and experts of all stripes, Kris Kobach vouched for it. Kobach told a local newspaper on November 30, 2016, "I think the president-elect is *absolutely correct* when he says the number of illegal votes cast exceeds the popular vote margin between him and Hillary Clinton." Compl. Ex. B (emphasis added). Kobach proclaimed that a "reasonable estimate" was that 3.2 million people had voted illegally in the election. *Id*.

Five days after taking office, on January 25, 2017, the President announced that he would launch an investigation into voter fraud. Compl. Ex. C. In an interview later that same day, the President explained that he launched this investigation to evaluate his claim that millions of people had voted illegally in the election. Compl. Ex. D. Ten days later in another interview, the President announced that Vice President Pence would chair a commission to conduct the investigation. Compl. Ex. E.

On February 12, 2017, Assistant to the President and Senior Advisor Stephen Miller reiterated the Administration's prejudgment of the Commission's conclusions in an interview with George Stephanopoulos. Miller stated that the Administration firmly believed there was rampant illegal voting in the election, and he named someone who professed the same view, Kansas Secretary of State Kris Kobach, as a purported expert who could validate the claim. Compl. Ex. F.

# B. President Trump Establishes the Commission Pursuant to FACA

President Trump established the Commission by Executive Order (the "Order") on May 11, 2017. Exec. Order 13799 (Compl. Ex. G). As the President had indicated he would, he appointed Vice President Pence to serve as Chair of the Commission. *Id.* § 2. The Order declared that the Commission's purpose is to "study the registration and voting processes used in Federal elections" and to report to the President on topics including "those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting." *Id.* § 3.

The Commission from the outset identified itself as a federal advisory committee subject to FACA. It filed a Charter as required by FACA on June 23, 2017, stating in the "Authority" section: "The Commission is established in accordance with Executive Order 13799 of May 11,

2017, . . . and the provisions of the Federal Advisory Committee Act ('FACA'), as amended (5 U.S.C. app.)." Compl. Ex. H § 2 (emphasis added).

The Charter endeavors to provide the information required by law for federal advisory committee charters, 41 C.F.R. § 102-3.75, including the Commission's objectives and scope, the time necessary to carry out the Commission's work, the Federal officer to whom the advisory committee reports (here, the President), and the agency responsible for providing the Commission necessary support (here, GSA). Compl. Ex. H §§ 3–11. The Charter also provides that "[t]he records of the Commission and any subcommittees shall be maintained pursuant to the Presidential Records Act of 1978 *and FACA*." *Id.* § 13 (emphasis added). The Commission is registered in GSA's "FACA database" and the Charter has been posted to the Commission's page within that database.

C. Vice Chair Kobach Uses the Commission to Promote His Candidacy for Governor and to Legitimate His Long History of Unsubstantiated Allegations Regarding Voter Fraud

The same day the President established the Commission, the White House announced the appointment of Kansas Secretary of State Kris Kobach as the Commission's Vice Chair.<sup>2</sup> The Commission has since announced eight additional members, all but one of whom are not full-time federal employees. *Electronic Privacy Information Center v. Presidential Advisory*Commission on Election Integrity ("EPIC"), No. 1:17-cv-01320-CKK (D.D.C.), ECF No. 11-1.

The public requires information to understand the central role that is being played by Vice Chair Kobach. Shortly after the Commission was announced, Vice Chair Kobach quickly

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<sup>&</sup>lt;sup>1</sup> FACA Database, http://www.facadatabase.gov/committee/committee.aspx?cid=2612&aid=74.

<sup>&</sup>lt;sup>2</sup> President Announces Formation of Bipartisan Presidential Commission on Election Integrity, May 11, 2017, WhiteHouse.gov, https://www.whitehouse.gov/the-press-office/2017/05/11/president-announces-formation-bipartisan-presidential-commission.

began using the Commission to advance his own partisan and personal interests. He declared his candidacy for Governor of Kansas on June 8, 2017, and soon thereafter began aggressively touting his role on the Commission to promote his candidacy—and even to solicit campaign donations. He has done so repeatedly and conspicuously on his campaign website, on his official campaign social media accounts, and in his public appearances.<sup>3</sup> Compl. Exs. J, K.

Kobach's political stock in trade has been to stoke fears of voter fraud, particularly by racial and ethnics minorities, and he now seeks the Commission's stamp of "respectability" for his scurrilous claims. Recently, a federal court granted a preliminary injunction against Kobach to prevent implementation of a law requiring documentary proof of citizenship for voter registration. *Fish v. Kobach*, 189 F. Supp. 3d 1107 (D. Kan. 2016), *affirmed*, 840 F.3d 710 (10th Cir. 2016). Even more recently in the same case, a United States Magistrate Judge fined Kobach \$1,000 for making false statements to the court while attempting to withhold documents that the court had ordered to be disclosed. *Fish v. Kobach*, No. 16-2105-JAR, 2017 WL 2719427, at \*5 (D. Kan. June 23, 2017). Kobach's record casts a cloud over the integrity of the Commission and further elevates the need for transparency.

#### D. The Commission Schedules and Conducts Meetings

On June 28, 2017, Vice President Pence presided over a meeting of the Commission held via phone conference. On the call, the Commission's members deliberated over the Vice Chair's plan to send a request to all 50 states and the District of the Columbia for the personal

<sup>&</sup>lt;sup>3</sup> The Lawyers' Committee has filed complaints with the Office of Special Counsel and the Office of Government Ethics alleging that these actions violate the Hatch Act and federal ethics rules, since Kobach holds the status of a special government employee as Vice Chair of the Commission. Compl. Exs. J, K.

information of registered voters. <sup>4</sup> There was no public notice of this June 28 meeting, nor was the public permitted to attend.

Kobach sent the letter to state officials the next day, June 29, 2017, and the request already is causing significant harm. There have been widespread reports of voters canceling their voter registrations out of fear of what the Commission will do with their personal information. For instance, Colorado officials have reported a 2,150 percent increase in registration cancellations since the Kobach letter was sent.<sup>5</sup> The North Carolina state elections board has been "deluged with calls" from concerned voters, many of whom have requested that their registrations be cancelled.<sup>6</sup> Officials in Florida and Arizona have reported similar responses from their residents.<sup>7</sup>

Against this backdrop of intense public concern regarding the Commission's activities, GSA posted notice in the Federal Register on July 5, 2017, that the Commission would meet on July 19, 2017. 2017 Fed. Reg. 14210. The Federal Register notice explained that "[t]he Commission was established in accordance with E.O. 13799 of [May] 11, 2017, the Commission's charter, *and the provisions of FACA*." *Id.* (emphasis added). But despite the Commission's repeated self-identification as an entity governed by FACA, and despite FACA's

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<sup>&</sup>lt;sup>4</sup> Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity, June 28, 2017, WhiteHouse.gov, https://www.whitehouse.gov/the-press-office/2017/06/28/readout-vice-presidents-call-presidential-advisory-commission-election.

<sup>&</sup>lt;sup>5</sup> Sam Levine, *Colorado Voters Are Canceling Their Registrations After Trump Request For Voter Data, July 8*, 2017, HuffPost, http://www.huffingtonpost.com/entry/colorado-voter-registration\_us\_59612aa4e4b02e9bdb0d072c.

<sup>&</sup>lt;sup>6</sup> Lynn Bonner, *NC elections office swamped with calls about voter data going to fraud commission*, July 7, 2017, http://www.charlotteobserver.com/latest-news/article160188674.html.

<sup>&</sup>lt;sup>7</sup> Flagler Voters Opting to Cancel Registration in Response to Trump Commission's Sweeping Records Request, FlagerLive, July 7, 2017, https://flaglerlive.com/109922/voter-registration-commission/; Yvonne Wingett Sanchez & Ronald J. Hansen, *Arizona to oppose handing over voter information to Trump commission*, Ariz. Republic, July 3, 2017, http://www.azcentral.com/story/news/politics/arizona/2017/07/04/arizona-oppose-handing-over-voter-information-trump-commission/449221001/.

requirement that meetings be open to public attendance and participation, the notice indicated that the meeting would be closed to public attendance and participation. The notice stated that the public could only watch the meeting via livestreaming on the White House's website. *Id.* 

There is also significant public concern regarding how the Commission will operate. While the Commission's Charter indicated that GSA is to provide administrative support services to the Commission, during a recent court hearing, lawyers for the Administration indicated that the data requested from state official would instead be maintained at the White House. And while the Commission provided a file transfer site to for state election officials to transmit the data, there is evidence that the site is was not secure. Finally, the Commission's unprecedented data request was, in several instances, directed to the wrong local officials, including ones who bear no responsibility for the voting and election process in their states. This evidence suggests that the Commission is not operating with an appropriate level of oversight and accountability, and further underscores the need for transparency.

# E. The Commission Ignores the Lawyers' Committee's Request for Records

On July 3, 2017, the Lawyers' Committee submitted a request for the Commission's records pursuant to Section 10(b) of FACA. Compl. Ex. L. The Lawyers' Committee requested that the recipients produce:

All emails since May 11, 2017 relating to the Commission's establishment, organization, operation, or work sent from or to the Commission's Chair, Vice Chair, other Commission members, or any federal employee (including special government employees) providing support to the Commission; and

All other documentary materials created or received since May 11, 2017, including but not limited to records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, or agenda, relating to the Commission's establishment, organization, operation, or work that were made available to, or prepared by, the Commission's Chair, Vice Chair, other Commission members, or any federal employee (including special government employees) providing support to the Commission.

The Lawyers' Committee further asked that Defendants include within their search responsive files and emails in the personal custody of the Chair, Vice Chair, other Commission members, and relevant federal employees, including in personal and state and local government email accounts, to the extent they are reasonably likely to include responsive records. *Id*.

The Lawyers' Committee emailed this request on July 3, 2017, and additionally mailed hard copies that were delivered on July 5, 2017. Ex. M. The Lawyers' Committee requested that Defendants produce responsive materials sufficiently in advance of the Commission's July 19, 2017 meeting to permit adequate time for review, and no later than July 14, 2017. Ex. L.

On July 5, 2017, in response to a separate lawsuit filed by the Electronic Privacy
Information Center and contrary to the Commission's Charter, Defendants wrote that they "do not concede that FACA applies to the Commission." *Electronic Privacy Information Center v.*Presidential Advisory Commission on Election Integrity, No. 1:17-cv-01320-CKK (D.D.C.),
ECF No. 8 at 12. Defendants thus suggested—for the first time and contrary to the
Commission's prior admissions and actions—that the Commission does not consider itself bound by FACA's requirements.

On July 9, 2017, the Lawyers' Committee sent a follow-up email confirming that it had not received any response to its request. Compl. Ex. N. To date, the Lawyers' Committee has not received any response, or even acknowledgement, of its request for records.

#### **ARGUMENT**

"The standard for a temporary restraining order is the same as that for preliminary injunction." *Singh v. Carter*, 168 F. Supp. 3d 216, 223 (D.D.C. 2016). The Lawyers' Committee must show: (1) likelihood of success on the merits; (2) that it is likely to suffer

irreparable harm absent preliminary relief; (3) that the balance of equities tips in its favor; and (4) that the requested relief is in the public interest. *Id.* The Lawyers' Committee can establish each of these elements here.

#### I. Likelihood of Success on the Merits

#### A. Defendants Continue to Violate Section 10 of FACA

Section 10(b)'s disclosure requirements are clear and mandatory. The Commission "shall [make] available for public inspection" all "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Commission and its members. 5 U.S.C. app. II § 10(b). This provision "affirmatively obligates the Government to provide access to the identified materials." *Food Chem. News v. Dep't of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992). And the Commission must provide access to its records "before or at" its meetings. *Id*.

These disclosure obligations apply to all federal advisory committees subject to FACA—including Presidential advisory committees. Section 10(b) applies to "each advisory committee" as defined under FACA, and Section 3 defines "advisory committee" to include committees "established or utilized by the President." 5 U.S.C. app. II §§ 3(2); 10(b). While several courts have declined to apply FACA's disclosure requirements to groups of Presidential advisors, the question in those cases was whether the group qualified as a "federal advisory committee" that fell under FACA at all. *See, e.g., Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466-67 (1989). The D.C. Circuit has squarely held that when the President does designate a Presidential advisory committee as established under FACA, it is subject to all of FACA's requirements. *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983). The court explained: "where the President formally

convenes an advisory committee pursuant to the FACA, he cannot claim that enforcement of the Act's requirements would unconstitutionally impede his ability to perform his functions." *Id*.

Indeed, the D.C. Circuit has specifically applied Section 10(b)'s disclosure requirements to a Presidential advisory committee constituted just like this one. In *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999), the court assessed the obligations of a Presidential advisory committee that was chaired by the Vice President and housed at the White House. The court held that the public "possesse[d] an enforceable right" to the committee's records under Section 10(b). *Id.* at 292.

Section 10(b) plainly applies to the Commission here, and Defendants have failed to meet their obligations under that provision. They previously held the June 28 telephonic meeting in violation of FACA's open access requirements, and without disclosing the Commission's records beforehand. And Defendants have not responded to, or even acknowledged, the Lawyers' Committee's request for records, nor have they provided any indication they will produce the Commission's records prior to the July 19 meeting. In fact, Defendants intimated in their July 5, 2017 brief in the *Electronic Privacy Information Center* case that they do not consider the Commission bound by FACA's requirements. *EPIC*, No. 1:17-cv-01320-CKK (D.D.C.), ECF No. 8 at 12. The Lawyers' Committee has a compelling basis to conclude that Defendants will not provide the requested materials before or at the meeting.

FACA indisputably applies to the Commission, and Defendants must abide by its requirements. They must immediately produce the Commission's records responsive to the Lawyers' Committee's request before the July 19 meeting.

#### B. Defendants Will Violate Section 10(a) of FACA

Defendants will also violate Section 10(a) of FACA if this Court does not intervene. Section 10(a) of FACA requires that all meetings of the Commission "shall be open to the public" and "[i]nterested persons shall be permitted to attend, appear before, or file statements" with the Commission. 5 U.S.C. app. II § 10(a).

The Commission's planned July 19, 2017 meeting does not meet these requirements for public access and participation. The Commission is not allowing a *single member of the public* to attend the meeting, despite the extraordinarily high public interest in attending. Instead, members of the public will only be able to view the proceedings if they have the means and wherewithal to access a livestream from the White House's website. Even if the livestream does not crash due to thousands of people trying to access the White House website at all once, and even if the livestream video somehow captures all of the Commission members at all times (both of which are doubtful), internet viewing capability—with no opportunity for public interaction or participation—simply does not meet FACA's public access requirements. Regardless of whether a livestream would be consistent with FACA's open meeting requirements for a committee with low public interest or relatively small responsibilities, *see* 41 C.F.R. § 102-3.140(e), it does not meet the letter or purposes of FACA for a committee with the size of membership, scope of duties, and national import that this Commission possesses. The Commission must open the July 19 meeting to in-person public attendance and participation.

#### II. Plaintiff Will Suffer Irreparable Harm Absent a Temporary Restraining Order

The Lawyers' Committee and other members of the public will suffer irreparable harm absent this Court's intervention. The Lawyers' Committee devotes considerable resources to protecting the voting rights of Americans and has a history of collaborating with federal law

enforcement agencies, including the U.S. Department of Justice, in this work. The work and activity of a new federal Commission focused on voting and elections is highly germane to the work of the Lawyers' Committee.

Access to the Commission's records before the July 19 meeting is essential to the Lawyers' Committee's ability to evaluate, inform the public about, and respond to the Commission's activities, including the July 19 meeting. And this access is especially important for the Lawyers' Committee and others to be able to assess what steps, if any, the Commission has taken to protect the security of the sensitive voter information it requested from states.

Absent a temporary restraining order, the Lawyers' Committee will have no other way to vindicate its right under FACA to access the Commission's records before it first meets. Any possible remedy that comes after the July 19 meeting will be too late. The Lawyers' Committee and other members of the public will suffer irreparable harm if denied access to the Commission records that FACA guarantees them. *See Pub. Citizen v. Nat'l Econ. Comm'n*, 703 F. Supp. 113, 129 (D.D.C. 1989) (granting temporary restraining order enjoining FACA meeting, based on finding of irreparable harm if were meeting conducted in contravention of FACA); *Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048, 1049 (D.D.C. 1974) (enjoining future FACA meetings until defendants complied with FACA's requirements).

Likewise, the Lawyers' Committee and other members of the public will suffer irreparable harm if denied the ability to attend and participate in the July 19 meeting. The right to attend the meeting will obviously be forever gone once the meeting concludes, and the ability to attend the first public meeting of the Commission is especially critical. *See Pub. Citizen*, 703 F. Supp. at 129 ("In the absence of injunctive relief, plaintiffs will be irreparably harmed" if FACA meeting conducted "behind closed doors," because they would be "denied, perhaps for all

time, but at a minimum during the on-going course, that which Congress expressly protected through FACA."); *Food Chemical News*, 378 F. Supp. at 1052 ("[I]t is imperative that public access to advisory committee meetings be provided by the Government if the Act is to become a reality and individuals such as Plaintiff are to have the opportunity to discharge their responsibility to inform the public.")

The risk of irreparable harm is also particularly acute here given the history of Vice Chair Kobach and other members of the Commission in suppressing the vote of certain populations. For instance, Commission member Ken Blackwell, as Ohio Secretary of State, once ordered local Ohio election boards to reject voter registration applications unless they were printed on paper of at least 80-pound thickness (as opposed to standard paper). And Commission member Hans von Spakovsky, while at the Department of Justice in the early 2000s, "led unsuccessful suits to purge voter rolls in Missouri" and "steamrolled the recommendations of career Justice lawyers." These Commission members now have the weight of a Presidential Advisory Commission that could potentially help them carry out their long-standing efforts to undermine voting rights. It is essential that there be full transparency, as required by FACA, so that the public can determine whether these individuals are attempting to use the Commission to generate new voter suppression schemes or other efforts to restrict voting rights.

<sup>&</sup>lt;sup>8</sup> *Block the Vote, Ohio Remix*, N.Y. Times, June 7, 2006, http://www.nytimes.com/2006/06/07/opinion/07wed1.html?mcubz=1.

<sup>&</sup>lt;sup>9</sup> Alex Horton & Gregory S. Schneider, *Trump's pick to investigate voter fraud is freaking out voting rights activists*, June 30, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/06/30/trumps-pick-to-investigate-voter-fraud-is-freaking-out-voting-rights-activists/?utm\_term=.ba8eff324e2d.

# III. The Balance of Equities Weigh in Favor of a Temporary Restraining Order

This Court considers whether the request relief would "substantially injure other interested parties" in weighing the balance of equities. *Singh*, 168 F. Supp. 3d at 223. Here, the requested relief would not injure Defendants nor anyone else. It would simply require Defendants to comply with their legal obligations. *See Pub. Citizen*, 703 F. Supp. at 129. Nor can Defendants claim imminent harm that would result from delaying the July 19 meeting until they have complied with their obligations. Indeed, there is nothing at all talismanic about that date and the fact that the Commission waited several months after it was created—and nearly six months after the President first announced his intention to investigate voter fraud when taking office—goes to show that a temporary delay of the July 19 meeting will not harm Defendants in any way. In contrast, if the requested TRO is not granted, the Lawyers' Committee will have forever lost its rights under FACA to access the Commission's records before it first meets and to exercise its statutory rights to attend the Commission's first meeting. The balance of harms tips entirely to one side in this case.

## IV. The Public Interest Weighs in Favor of a Temporary Restraining Order

Finally, the public interest weighs decisively in favor of granting the relief requested.

FACA's entire purpose is to vindicate "the public . . . right to know how its government is conducting the public's business." *Pub. Citizen*, 703 F. Supp. at 129. That public interest is at its peak here given the enormous import and potential consequences of the Commission's work, as well as the significant reasons to believe that the Commission is being used for ulterior motives.

Moreover, the need for immediate public access to the Commission's records and meetings is especially important given the consequences of the Commission's request to states for voter data. In an era of rampant identity theft, hacking, and invasions of privacy, millions of

Americans are understandably concerned with any dissemination of their personal identifying information. Added to these concerns is the widespread fear of the Commission's activities and what it will do with their data, a fear that secrecy only fuels. As explained, in consequence, voters across the nation have begun cancelling their voter registrations in response to the Commission's data request. The public must know the Commission's true intentions to address these concerns. Indeed, if the Commission has no improper motives, as its members have suggested, the Commission should be anxious to fully disclose its records and open its meetings to put the public at ease. And if the Commission's motives are in fact improper, transparency could not be more important to the public interest.

#### CONCLUSION

The Lawyers' Committee respectfully requests that this Court enter a temporary restraining order: (1) ordering Defendants to produce records responsive to the Lawyers' Committee's request prior to the Commission's July 19 meeting; (2) requiring the Commission to open the July 19 meeting to in-person public attendance and participation; and (3) enjoining the Commission from holding the July 19 meeting until it has met its records and public access obligations under FACA.

DATED: July 10, 2017

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\*D.D.C. application forthcoming
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